

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL

76-1450

B
P/S

**United States Court of Appeals
For the Second Circuit**

UNITED STATES OF AMERICA,

Appellee,

-against-

MAX JIMENEZ and JAMES H. MALONE,

Appellants

*On Appeal from the United States District Court for the
Eastern District of New York*

APPELLANTS' JOINT APPENDIX

JAY GREGORY HORLICK

Attorney for Appellant Malone

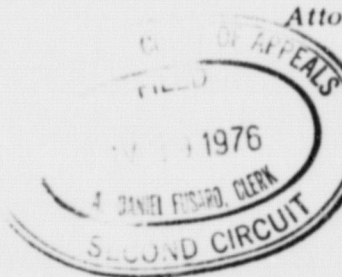
MICHAEL S. WASHOR

Attorney for Appellant Jimenez

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Brooklyn, New York 11241

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BEST COPY AVAILABLE

LOCKET ENTRIES (MALONE)

Case Filed
Day Mo. Yr. 20 2 76
No. of 2
Defendants 2

Assigned Trial
ISTRATE 0715
Disp./Sentence

U.S. v. **76 CR 133**
JAMES H. MALONE

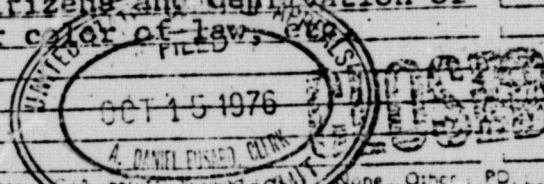
defendant

COURTS 3

MA R. CAL. NO.

U.S. CODE SECTION
8-241, 242 & 6

OFFENSES
Did conspire with another against
rights of citizens and deprivation of
rights under color of law.



BAIL • RELEASE
☐ Personal Recog.
☐ Unsecured Bond
☐ Conditional Release
Set (000) \$
☐ 10% Deposit
☐ Surety Bond
☐ Collateral
date
☐ Bail Not Made
☐ Bail Status Changed
(See Docket)
☐ 3rd Party Custody
☐ PSA

U.S. Attorney or Asst.
Thomas Puccio

Defense: A. DANIEL PUSSEY, CLERK
Harvey Greenberg
16 Court St., Bklyn, NY 11241
625-6578

ARREST

INDICTMENT

ARRAIGNMENT

TRIAL

SENTENCE

U.S. Custody
Began on Above
Charges

☐ High Risk
Defn. &
Date Design'd

Information ☐
2-20-76
☐ Waived
☐ Superseding
☐ Indict/Info

3-3-76
1st Plea
II
Final Plea

Trial Set For
4/5/76
☒ Not Guilty
☐ Nolo
☐ Guilty
☐ Not Guilty
☐ Nolo
☐ Guilty

Voir Dire ☐
Trial Began ☒
7/25/76
Trial Ended
6/7/76

Disposition
9/15/76
☒ Convicted
☐ Acquitted
☐ Dismissed
☐ Nolo/Discontinued
☐ On All Charge
☐ On Lesser Offense(s)
☐ WOP; ☐ WP

☐ Prosecution Deferred

Search Warrant	Issued	DATE	INITIAL/No.	INITIAL APPEARANCE	INITIAL/No.	OUTCOME
	Return			PRELIMINARY EXAMINATION OR REMOVAL HEARING		<input type="checkbox"/> Dismissed <input type="checkbox"/> Held for District GJ <input type="checkbox"/> Held to Answer to U. S. r
Summons	Issued			<input type="checkbox"/> Waived <input type="checkbox"/> Not Waived	<input type="checkbox"/> Intervening Indictment	<input type="checkbox"/> Exonerated <input type="checkbox"/> To Transferee
Arrest Warrant	Served			Tape No.	INITIAL/No.	AT: Magistrate's Initials
COMPLAINT						
OFFENSE (in Complaint)						

Show last names and suffix numbers of other defendants on same indictment/information

JIMINEZ 1;

DATE	PROCEEDINGS
20-76	Before JUDD, J - Indictment filed - Bench Warrant Ordered and Issued.
25-76	Notice of Readiness for trial filed
2/27/76	Before WEINSTEIN, J. - Case called - deft present without counsel - case adjd to 3/3/76 at 10:30 A.M. - deft to obtain atty ready for trial 4/5/76 - bail contd
3/1/76	Magis; proceedings received from S.D.Fla and filed - acknowledgment mailed for receipt of record
3-3-76	Before WEINSTEIN J - case called - deft & counsel present - deft arraigned and enters a plea of not guilty - Ore Trial conference held and concluded - bail of \$25,000= PRB - trial set for 4-5-76
3-3-76	Notice of Appearance filed
3-11-76	Copy of letter filed dated 3-10-76 received from Chambers from Harvey L. Greenberg, Esq.
4-12-76	Notice of motion filed for dismissal of the indictment and Memorandum of law filed in support of motion etc.
4-13-76	Notice of motion filed for dismissing the second count of the indictment, etc.
4-29-76	Letter filed dated 4-26-76 received from Chambers from Harvey Greenberg, Esq. to permit counsel to argue matter in the Court of Appeals on May 6 at 2:00 PM (trial set

IV. PROCEEDINGS (continued)

V. EXC. LUD.
(a) (b)

in this case for May 6) Arrangements will be made to permit counsel to argued in the Court of Appeals. So Ordered by Judge Weinstein.

5/5/76 Petition for writ of habeas corpus ad testificandum filed- issued

5/7/76 Petition for writ of habeas corpus ad testificandum filed- issued

5-13-76 Writ ret'd and filed - executed.

5/18/76 Petition for writ of habeas corpus ad testificandum filed- issued

5/19/76 Petition for writ of habeas corpus ad testificandum filed- issued

5/19/76 Writ ret'd and filed- executed

5-20-76 Petition for Writ of habeas corpus ad testificandum filed - writ issued.

5/21/76 Before WEINSTEIN, J.- Case called- deft and counsel present- court reserves decision on motion to dismiss parties to submit briefs

5-25-76 Before WEINSTEIN J - case called - deft & atty present - trial ordered and BEGUN - Jurors selected and sworn - trial cont'd to May 26, 1976 at 11:am.

5-26-76 Before WEINSTEIN J - case called - deft & atty present - trial resumed - trial cont'd to May 27, 1976

5-27-76 Writ ret'd and filed - executed.

5/27/76 Before WEINSTEIN, J.- Case called- deft and counsel present- trial resumed-trial cont'd to 6/23/76

6-1-76 Before WEINSTEIN J - case called - deft & counsel present - trial resumed - trial cont'd to 6-2-76

6/2/76 Before WEINSTEIN, J.- Case called- deft and counsel present- trial resumed- govt rests- deft's motion to dismiss denied- trial cont'd to 6/3/76

6/3/76 Before WEINSTEIN, J.- Case called- deft and counsel present-trial resumed-govt rests-both sides rest trial cont'd to 6/4/76

6/4/76 Before WEINSTEIN, J.- Case called- deft and counsel present-trial resumed-order of sustenance signed-trial cont'd to 6/3/76

6/4/76 By WEINSTEIN J.- Order of sustenance filed

6/7/76 Before WEINSTEIN, J.- case called- deft and counsel present- jury retires to deliberate-order of sustenance signed- trial cont'd to 6/8/76

6/7/76 By WEINSTEIN, J.- Orders(2) of sustenance filed

6-8-76 Subpoena filed received from Chambers(with notation on envelope to file signed by Weinstein, J.

6-8-76 Before WEINSTEIN J - case called - deft & atty present - trial resumed - Jury resumes deliberations at 10:am - Order of sustenance signed for Lunch - Jury resumes deliberations at 2 PM - Jury returns at 4 PM and renders a verdict of guilty on counts 1 and 3 and not guilty as to count 2 as to each deft - jury polled and discharged - all motions adjd to June 29, 1976 at 9:30 am - bail limits extended to Fla. as to deft MALONE - sentences adjd without date.

6-8-76 By WEINSTEIN J - Order of sustenance filed (Lunch)

6-8-76 4 stenographers transcripts filed (one dated May 25, June 2, June 3 and June 4, 1976 respectively)

6-9-76 3 stenographers transcripts filed (one dated May 26, May 27 and one dated June 1, 1976)

6/10/76 Stenographer Transcript dated 6/8/76

6-24-76 Writs returned and filed/executed as to Louis Ortega & Francisco Cuevas.

9/1/76 Stenographers transcript dated 6/30/76 filed.

9-17-76 Before WEINSTEIN, J. - Case called. Deft & counsel present. Deft sentenced to 7 years imprisonment on count 1 and 1 year imprisonment on count 3 to run concurrently. Stay of execution of sentence pending appeal is granted. Deft may travel to and from Florida to conduct his business. Deft O.R.

9-17-76 Judgment and commitment filed. Certified copies to US Marshal.

9/24/76 Notice of Appeal filed.

9/24/76 Docket entries and duplicate of Notice of Appeal sent to the C of A.

9/28/76 By WEINSTEIN, J. - Ordered that the Petitioner - Fernando Martinez, be permitted to obtain the necessary treatments to correct his current dental problems from his private dentist, Dr. Jesse Lev of 4401 Avenue D, Brooklyn, New York.

10/7/76 Voucher for compensation filed for expert services.

10/14/76 Record on appeal certified and filed to the Court of appeals.

DATE

BY

DOCKET ENTRIES (JIMINEZ)

Assigned Trial SYNATE 0715	U.S. vs. 76 CR 133	Day Mo. Yr. 20 2 76	Docket No. 133	1
1 Office	MAXIMO H. JIMINEZ	-1	No. 2	WEINSTEIN, J
CODE SECTION 18-241, 242 & 2	OFFENSES Did conspire against rights of citizens and deprivation of rights under color of law etc.	COUSITS 3	MAGR. CASE NO.	
J.S. Attorney or Asst Thomas Puccio	JOEL WEINBERG 401 Broadway N.Y. 226-6820	FILED OCT 15 1976 4th JUDICIAL DISTRICT SECOND CIRCUIT	<input type="checkbox"/> BAIL • RELEASE <input type="checkbox"/> Personal Recog. <input type="checkbox"/> Denied <input type="checkbox"/> Unsecured Bond <input type="checkbox"/> AMT <input type="checkbox"/> Conditional Release <input type="checkbox"/> Set (000) <input type="checkbox"/> 10% Depo <input type="checkbox"/> \$ <input type="checkbox"/> Surety Bo <input type="checkbox"/> date <input type="checkbox"/> Collateral <input type="checkbox"/> Bail Not <input type="checkbox"/> 3rd Party <input type="checkbox"/> Made <input type="checkbox"/> Custody <input type="checkbox"/> Bail Status <input type="checkbox"/> PSA <input type="checkbox"/> Changed <input type="checkbox"/> (See Docket)	

ARREST	INDICTMENT	ARRAIGNMENT	TRIAL	SENTENCE
<input type="checkbox"/> U.S. Custody <input type="checkbox"/> Began on Above <input type="checkbox"/> Charges <input type="checkbox"/> Prosecution Deferred	<input type="checkbox"/> High Risk <input type="checkbox"/> Defn. & <input type="checkbox"/> Date Design'd 2-20-76 <input type="checkbox"/> Waived <input type="checkbox"/> Superseding <input type="checkbox"/> Indict/Info	2/23/76 <input type="checkbox"/> 1st Plea <input type="checkbox"/> Final Plea	Trial Set For 4-5-76 <input type="checkbox"/> Not Guilty <input type="checkbox"/> Nolo <input type="checkbox"/> Guilty <input type="checkbox"/> Not Guilty <input type="checkbox"/> Nolo <input type="checkbox"/> Guilty Trial Began 5/25/76 Trial Ended 6/7/76	Disposition 9/15/76 <input type="checkbox"/> Convicted <input type="checkbox"/> On All Charge <input type="checkbox"/> Acquitted <input type="checkbox"/> On Lesser <input type="checkbox"/> Dismissed <input type="checkbox"/> Offense(s) <input type="checkbox"/> Nolo/Discontinued* <input type="checkbox"/> WOP; <input type="checkbox"/> WF

Search	Issued	DATE	INITIAL/No.	INITIAL APPEARANCE	INITIAL/No.	OUTCOME
Warrant	Return			PRELIMINARY EXAMINATION OR REMOVAL HEARING		<input type="checkbox"/> Dismissed <input type="checkbox"/> Held for District CJ <input type="checkbox"/> Held to Answer to U. S. District Court <input type="checkbox"/> Exonerated <input type="checkbox"/> To Transferee District
Summons	Served			<input type="checkbox"/> Waived <input type="checkbox"/> Not Waived <input type="checkbox"/> Intervening Indictment		
Arrest Warrant				Tape No.	INITIAL/No.	Magistrate's R
COMPLAINT						
OFFENSE (In Complaint)						

Show last names and suffix numbers of other defendants on same indictment information.

DATE	PROCEEDINGS
2-20-76	Before JUDD, J - Indictment filed - Bench Warrant Ordered and Issued.
2-23-76	Before WEINSTEIN J - case called - deft & atty present - Deft arraigned & enters a plea of not guilty - all motions to be made returnable within 2 weeks - bail set at \$5,000 PRB - Pre Trial Conference held & concluded - trial set for 4-5-76.
2-25-76	Notice of Readiness for Trial filed
3/1/76	Notice of appearance filed
3-2-76	Stenographers transcript filed dated 2-23-76
3-11-76	Copy of letter filed dated 3-10-76, received from Chambers from Harvey L. Greenberg, Esq.
3-24-76	Petition for Writ of Habeas Corpus Ad Testificandum filed. Writ issued.
3-31-76	Writ returned and filed/executed.
4-12-76	Notice of Motion filed for dismissal of the indictment and Memorandum of Law in support of motion etc.
4-13-76	Notice of Motion filed for dismissing the second count of the indictment, etc.

5/2/76 Petitions(3) for writ of habeas corpus as testifi-
 candum filed- issued
 5/3/76 inserted in CR file
 5/7/76 Writ read and filed - executed.
 5/13/76 Writs read and filed - Executed (2 writs)
 5/13/76 Letter filed dated 4-26-76 received from Chambers from
 Harvey L. Greenberg, Esq. to permit counsel to argue
 matter in the Court of Appeals on May 6 at 2:00 PM.
 (trial set in the case for May 6) Arrangements will be
 made to permit counsel to argue in the Court of Appeals.
 So Ordered by Judge Weinstein
 5/5/76 Petition for writ of habeas corpus ad ~~prosequendum~~ ^{testificandum}
 filed- issued
 5/7/76 Petition for writ of habeas corpus ad ~~prosequendum~~ ^{testificandum}
 filed- issued
 5-18-76 Petition for writ of habeas corpus ad ~~prosequendum~~ ^{testificandum}
 filed - issued
 5/18/76 Petition for writ of habeas corpus ad ~~prosequendum~~ ^{testificandum}
 filed-issued
 5/19/76 Petition for writ of habeas corpus ad ~~prosequendum~~ ^{testificandum}
 filed- issued
 5/19/76 Writ read and filed- executed
 5-20-76 Petition for writ of habeas corpus ad ~~prosequendum~~ ^{testificandum} filed.
 Writ issued.
 5/21/76 Before WEINSTEIN, J.- Case called- deft and counsel
 present-court reserves decision on motion to dismiss
 parties to submit briefs
 5-25-76 Before WEINSTEIN J - case called - defts & counsels
 present - trial ordered and BECUN - Jurors selected
 and sworn - trial contd to May 26, 1976 at 11:am.
 5-26-76 Before WEINSTEIN - case called - deft & counsel
 present - trial resumed - trial contd to 5-27-76.
 5-27-76 Writ read and filed - executed.
 5/27/76 Before WEINSTEIN, J.- Case called- deft and counsel
 present- trial resumed-trial contd to 6/1/76
 6-1-76 Before WEINSTEIN J - case called - deft & counsel
 present - trial resumed - trial contd to 6-2-76.
 6/2/76 Before WEINSTEIN, J.- Case called- deft and counsel
 present-trial resumed-govt rests- deft's motion to
 dismiss denied-trial contd to 6/3/76 at 10:00 A.M.
 6/3/76 Before WEINSTEIN, J.-Case called-deft and counsel
 present-trial resumed-govt rests-both defts rest
 trial contd to 6/4/76
 6/4/76 Before WEINSTEIN, J.-Case called- deft and counsel
 present- trial resumed-order of sustenance signed
 trial contd to 6/7/76 at 10:00 A.M.
 6/4/76 By WEINSTEIN, J.- Order of sustenance filed
 6/7/76 Before WEINSTEIN, J.-Case called- deft and counsel
 present- trial resumed- jury retires to deliberate
 order of sustenance signed-trial contd to 6/8/76
 6/7/76 By WEINSTEIN, J.- Orders(2) of sustenance filed

PROCEEDINGS

6-8-76 Subpoena filed received from Chambers (with notation on envelope to docket and file (see notation of Judge Weinstein dated June 8 on the envelope)

6-8-76 Before WEINSTEIN J - case called - deft & atty present - trial resumed - Jury resumes deliberations at 10:00 am - order of sustenance signed (lunch) Jury resumes deliberations at 2 PM. Jury returns at 4:PM and renders a verdict of guilty as to counts 1 and 3 as to both defts; not guilty as to count 2 as to both defts - Jury polled and discharged - all motions adjd to June 29, 1976 at 9:30 am - bail limits extended to Fla. as to deft MALONE - sentences adjd without date.

6-8-76 By WEINSTEIN J - Order of sustenance filed (lunch)

6-8-76 4 stenographers transcripts filed (one dated May 25, June 2, June 3 and June 4 1976 respectively.

6-9-76 3 stenographers transcripts filed (one dated May 26, May 27 and one dated June 1, 1976)

6/10/76 Stenographers Transcripts dated 6/8/76 filed

6-24-76 Writs returned and filed/executed as to Louis Ortega & Francisco Guevas.

6-30-76 Before WEINSTEIN J - case called - deft Jiminez & counsel present - Post trial motions are denied - defts motion to set aside the verdict of denied - So Ordered.

8-6-76 Writ ret'd and filed - executed (witness)

9/1/76 Stenographers Transcript dated 6/30/76 filed.

9/14/76 Letter to Judge Weinstein from Michael S. Washor, Esq. requesting that a hearing be held 2 days prior to said date of sentencing.

9-17-76 Before WEINSTEIN, J. - Case called. Deft & counsel present. Deft sentenced to imprisonment for a period of 9 years on count 1 and 1 year on count 3 to run concurrently. Stay of execution of sentence granted pending appeal. Deft O.R.

9-17-76 Judgment and commitment filed. Certified copies to US Marshal.

9/24/76 Notice of Appeal filed.

9/24/76 Docket entries and duplicate of Notice of Appeal mailed to the C Of A.

9/28/76 By WEINSTEIN, J. - ordered that the petitioner be permitted to obtain the necessary permits to correct his current dental problems from his private dentist, Dr. Jesse Lev of 4601 Avenue D, Brooklyn, New York (Petitioner - Fernando Martinez)

10/7/76 .. order for compensation for expert services filed.

Record on appeal certified and mailed to the Court of Appeals.

10/14/76

A TRUE COPY
ATTEST
DATED Oct 14 76
LEWIS C. COOK
BY *Lewis Cook*
CLERK OF COURT

INDICTMENT

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT ED. NY
★ FEB 20 1976 ★

8a

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

TIME A.M.
P.M.

----- X
UNITED STATES OF AMERICA

76 CR 133

- against -

Cr. No.
(18 U. S. C., Section 241)
18 U. S. C., Section 242
18 U. S. C., Section 2)

MAXIMO H. JIMINEZ and
JAMES H. MALONE,

Defendants.

----- X
The Grand Jury Charges:

COUNT ONE

1. Between the years 1969 to 1971 there was an investigative unit within the Narcotics Bureau of the New York City Police Department entitled the Special Investigations Unit (SIU). The jurisdiction of SIU was citywide and its function was to gather evidence for the arrest and prosecution of major narcotics violators. During the aforesaid period, MAXIMO H. JIMINEZ and JAMES H. MALONE, the defendants, and Dominick Butera, now deceased and named herein as a co-conspirator and not as a defendant, were members of SIU and, as such, were police officers acting under color of the law of the State of New York.

2. During the aforesaid period the legitimate function of the SIU was perverted and subordinated to the end of obtaining sums of money for its members, including the defendants, through theft and extortion from narcotics dealers and suspects who were the subjects of their investigations. In short, the principal purpose of the investigations conducted by members of SIU, includ-

ing the defendants, was not to convict those illegally engaged in the narcotics trade, but to enrich the members of the SIU through repeated violations of the Constitution of the United States, the laws of the State of New York and the regulations of the Police Department of the City of New York.

3. The illegal activity of the various members of the SIU, including the defendants, was undertaken with the knowledge and consent of the other members of SIU and could not have succeeded without their joint cooperation.

4. On or about and between the 1st day of January 1969 and the 30th day of December 1971, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, for the purpose of carrying out the illegal SIU activities heretofore described, MAXIMO H. JIMINEZ and JAMES H. MALONE, the defendants, together with Dominick Butera and other co-conspirators known and unknown to the Grand Jury, wilfully, knowingly and unlawfully combined, conspired, confederated and agreed together and with each other to use their authority as police officers acting under color of the law of the State of New York to injure, oppress, threaten and intimidate citizens in the free exercise and enjoyment of rights and privileges secured to them by the Constitution of the United States.

5. It was part of said conspiracy that the defendants and their co-conspirators wilfully, knowingly and unlawfully would use their authority as police officers acting under color of the law of the State of New York to obtain money by theft, extortion and other unlawful means from Ismael Quinones, John Boland and William Armenta, who were citizens of the United States, thereby injuring, oppressing, threatening and intimidating them in the free exercise

and enjoyment of a right and privilege secured to them by the Constitution of the United States, namely, the right not to be deprived of property without due process of law.

6. It was further a part of said conspiracy that the defendants and their co-conspirators would conceal the existence of the conspiracy and would take steps designed to prevent disclosure of their activities.

In furtherance of the conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Eastern District of New York and elsewhere:

OVERT ACTS

1. On or about February 20, 1971, defendants JIMINEZ AND MALONE and other members of SIU divided among themselves approximately \$4,000.00 taken from the apartment of one Ismael Quinones in Brooklyn, New York.

2. On or about March 18, 1971, defendants JIMINEZ and MALONE and co-conspirator Butera had a conversation with John Boland and William Armond at the 114th Precinct in Queens, New York.

(Title 18, United States Code, Section 241).

COUNT TWO

The Grand Jury Further Charges:

On or about the 20th day of February 1971, within the Eastern District of New York, MAXIMO H. JIMINEZ and JAMES H. MALONE, the defendants, using their authority as police officers acting under color of the law of the State of New York, wilfully, knowingly and unlawfully did take, abstract and appropriate to them-

selves approximately Four Thousand Dollars (\$4,000.00) from Ismael Guinones, an inhabitant of the State of New York, thereby depriving him of a right secured and protected by the Constitution of the United States, namely the right not to be deprived of property without due process of law. (Title 18, United States Code, Section 242 and Title 18, United States Code, Section 2).

COUNT THREE

The Grand Jury Further Charges:

On or about the 19th day of March 1971, within the Eastern District of New York, MAXIMO H. JIMINEZ and JAMES H. MALONE, the defendants, using their authority as police officers acting under color of the law of the State of New York, wilfully, knowingly and unlawfully did take, abstract and appropriate to themselves approximately Four Thousand Five Hundred Dollars (\$4,500.00) from John Boland and William Armond, inhabitants of the State of New York, thereby depriving them of a right secured and protected by the Constitution of the United States, namely the right not to be deprived of property without due process of law. (Title 18, United States Code, Section 242 and Title 18, United States Code, Section 2).

A TRUE BILL.

Roberto Sabella

FOREMAN.

David G. Prager
DAVID G. PRAGER
United States Attorney
Eastern District of New York

JUDGMENT AND COMMITMENT (MALONE)

122

United States of America vs.

United States District

Eastern Dist. of NY

DEFENDANT

JAMES H. MALONE

DOCKET NO.

76 CR-133

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date

MONTH DAY YEAR
9 17 1976

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

Harvey Greenberg, Esq.
(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea,

☐ NOLO CONTENDERE,

☐ NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of ☐ NOT GUILTY. Defendant is discharged
☒ GUILTY in counts 1 and 3

Defendant has been convicted as charged of the offense(s) of violating T-18, U.S.C.Secs. 241, 242 and 2 in that between the years 1969 to 1971, the defendant, with another, did conspire to wilfully & unlawfully use their authority as police officers, to obtain money by theft, extortion and other unlawful means from others who were citizens of the U.S. by injuring, oppressing, threatening and intimidating them in the free exercise and enjoyment of a right and privilege secured to them by the Constitution of the U.S. namely, the right not to be deprived of property without due process of law and did abstract approximately \$4,500 to themselves from others.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

SENTENCE OR PROBATION ORDER

7 years on count 1 and 1 year imprisonment on count 3 to run concurrently. Stay of execution of sentence pending appeal is granted. Defendant may travel to and from Florida to conduct his business.

SPECIAL CONDITIONS OF PROBATION

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.
★ SEP 17 1976 ★
TIME A.M.
P.M.

**ADDITIONAL
CONDITIONS
OF
PROBATION**

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set forth in the Federal Rules of Criminal Procedure, and the conditions of probation, reduce or extend the period of probation, and at any time during the probation period, but without exceeding a probation period of five years permitted by law, may issue a warrant and revoke probation for a violation of any condition during the probation period.

**COMMITMENT
RECOMMEN-
DATION**

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

☐ U.S. DISTRICT JUDGE

☐ U.S. Magistrate

Ed. B. Whiting
Date *September 17, 1976*

BEST COPY AVAILABLE

JUDGMENT AND COMMITMENT (JIMINEZ)

14a

United States of America vs.

RECEIVED

United States District Court

DEFENDANT

Eastern Dist. of NY

76 CR 133

MAXIMO H. JIMINEZ

DOCKET NO.

JUDGMENT AND PROBATION/COMMITMENT ORDER

CR-76-133

In the presence of the attorney for the government
the defendant appeared in person on this date

MONTH	DAY	YEAR
9	17	1976

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

Michael Washor, Esq.

(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea,☐ NOLO CONTENDERE,☐ NOT GUILTY

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged
☒ GUILTY. counts 1 and 3

FINDING & JUDGMENT

Defendant has been convicted as charged of the offense(s) of violating T-18, U.S.C. Secs. 241, 242 and 2 in that between the years 1969 - 1971, the defendant, with another, did conspire to wilfully and unlawfully, use their authority as police officers to obtain money by theft, extortion and other unlawful means, from others, who were citizens of the U.S. by injuring, oppressing, threatening and intimidating them in the free exercise and enjoyment of a right and privilege secured to them by the Constitution of the U.S. namely the right not to be deprived of property without due process of law and did abstract approximately \$4,500 to themselves from others.

The defendant, whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

SENTENCE
OR
PROBATION
ORDER

9 years on count 1 and 1 year on count 3 to run concurrently. Stay of execution of sentence granted pending appeal.

BEST COPY AVAILABLE

**SPECIAL
CONDITIONS
OF
PROBATION**

**ADDITIONAL
CONDITIONS
OF
PROBATION**

**COMMITMENT
RECOMMEN-
DATION**

SIGNED BY

☐ U.S. District Judge

☐ U.S. Marshal

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.


★ SEP 17 1976 ★

TIME A.M. _____
P.M. _____

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be complied with. The Court may, from time to time, modify the conditions of probation, reduce or extend the period of probation, and it may, after giving the defendant notice, extend or terminate probation for a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.


Date September 17 1976

1 PRE-TRIAL HEARING

2 UNITED STATES DISTRICT COURT

3 EASTERN DISTRICT OF NEW YORK

4 -----X

5 UNITED STATES OF AMERICA, :

6 Plaintiff, :

7 -against- :

76-CR-133

8 MAXIMO JIMINEZ and JAMES :

9 MALONE, Defendants.:

10 -----X

11
12 United States Courthouse
Brooklyn, New York

13 May 21, 1976
14 10:00 o'clock a.m.

15
16 B e f o r e :

17 HONORABLE JACK B. WEINSTEIN,

18 U.S.D.J.

19
20
21 *Daniel D. Simon*

22
23 DANIEL D. SIMON
24 OFFICIAL COURT REPORTER
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A p p e a r a n c e s :

DAVID G. TRAGER
United States Attorney
Eastern District of New York

BY: PETER R. SCHLAM
Assistant United States Attorney

MICHAEL WARSHOR, ESQ.
Attorney for defendant Maximo Jiminez

HARVEY GREENBERG, ESQ.
Attorney for defendant James Malone

* * *

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1 MR. SCHLAM: Good morning, your Honor.

2 THE COURT: I think it probably would be easier if
3 we were to bring the government attorney over here and
4 defense counsel next to their respective clients.

5 MR. WARSHOR: Do you mind at this time if they are
6 next to each other at the pretrial hearings?

7 THE COURT: I would rather that you be next to your
8 client.

9 All right. We are here for what purpose?

10 MR. WARSHOR: Well, your Honor, as you well know I
11 am participating in this trial as of two or three days,
12 and I am relying on some of the material that I have from
13 the prior attorney and from conferences with co-counsel.

14 I understand that there is an issue and a motion
15 was made relative to speedy trial. I suppose that ought
16 to be discussed and reasoned out at this time.

17 THE COURT: Are you suggesting that you are not
18 prepared to try the case?

19 MR. WARSHOR: Oh, yes, I am. But I believe these
20 are preliminary matters that are before this court at
21 this time. There are certain issues that I wish to
22 raise, but I suppose that we can hold that in abeyance
23 until we decide - -

24 THE COURT: All right, what is the first issue
25 that you want to take up?

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1 MR. WARSHOR: I suppose it would be the speedy
2 trial concern.

3 THE COURT: All right.

4 MR. WARSHOR: Mr. Jacobs had submitted a memorandum
5 to the court requiring or requesting a hearing on the
6 matter.

7 And as I understand the facts - -

8 THE COURT: Well, the hearing will now start. I
9 will give you a hearing.

10 MR. WARSHOR: Well, now, it is a question of the
11 burden of going forward at this particular time. Let me
12 make a presentation to your Honor so you can determine
13 whether or not there would be a necessity to perpetuate
14 the testimony in this matter.

15 The incidents in the indictment commence from
16 1969 to 1971 through the entire year of 1971.

17 It is the contention of the defendants that the
18 government had or should have had the requisite knowledge
19 of the alleged improprieties, and delay the prosecution
20 herein for an unreasonable period of time so it has put
21 the defendants at a distinct disadvantage.

22 Firstly we allege that the delay is somewhat
23 purposeful, and secondly that there has been actually
24 prejudice which has inured to the detriment of the
25 accused.

1 I am aware of the Marron case. I am aware of the
2 two recent cases from the Second Circuit which really do
3 not take a definitive position as to whether we have to
4 establish or it must be established to the court's
5 satisfaction that there is a purposeful delay as well as
6 prejudice.

7 Firstly there are two individuals by the name of
8 Butera and Horrigan who are members of the SIU and who
9 we have reason to believe were a part of the team of
10 police officers during this period of time, and we have
11 reason to believe that the testimony during the course of
12 the trial would indicate conversations, actions, conduct,
13 etcetera, by and between Horrigan and Butera. That by
14 innuendo and by inference and by direct application of
15 certain of our laws would be attributable to the accused.

16 Both these two individuals are now deceased.

17 I believe the notice of motion of Mr. Jacobs and
18 his accompanying affidavit recited the exact dates when
19 the two individuals died.

20 The obvious problems of memory loss, the obvious
21 problems of not being able to adequately recall dates,
22 times, places and incidents during this hiatus of time
23 obviously presents itself as a serious problem to the
24 accused.

25 Insofar as I am led to believe in 1972 one witness

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1 by the name of Armond contacted the defendant Jiminez
2 and was working for the authorities, if I am accurate,
3 Special Prosecutor Maurice Najari. And that at least at
4 that time and probably sometime before there was an
5 investigation into the conduct of the defendant Jiminez,
6 the allegation obviously being corrupt activities by the
7 accused as a police officer. And I have reason to believe
8 that there was a tape recording made of the conversation
9 by and between the defendant Jiminez and this one Armond.

10 I have further reason to believe that the govern-
11 ment in this instance had available to it most if not all
12 of the information, the witnesses, etcetera, that may
13 well be produced during the course of the trial here.

14 THE COURT: When?

15 MR. WARSHOR: Well, I know that Captain Daniel
16 Tange, who I believe is a prospective witness for the
17 government, back in 1972 had taken a step toward
18 cooperating with the government directly.

19 I have mentioned to you the Armond situation
20 early in 1972.

21 We have an indictment here I believe that was
22 founded I believe on the 20th - - Mr. Greenberg - -
23 the 20th of February 1976, if I am correct.

24 I further believe that the government had know-
25 ledge that there was a state case that was pending

1 against Maximo Jiminez for a considerable period of time.
2 And I think it is more than mere coincidence that the
3 indictment followed February of 1976 when the trial in
4 the State case occurred, and terminated in mid-February,
5 if I am accurate, 1976.

6 And the allegation or position that we are taking
7 is that there was a delay here by the government un-
8 warranted and for an unreasonable period of time, your
9 Honor, putting us at a distinct disadvantage. And in
10 fact giving the government a decided advantage vis-a-vis
11 the result of the State conviction.

12 It so happens that he was convicted after trial
13 in the State Court.

14 And the charges in the State Court were similar,
15 if not identical background - - the nomenclature of the
16 client being somewhat different - - but no difference in
17 substance.

18 THE COURT: Well, has he been sentenced?

19 MR. WARSHOR: No, he has not been sentenced. But
20 I understand your Honor's feeling about whether a
21 sentence has been imposed, and whether it constitutes a
22 final judgment or not. I have had the benefit of reading
23 some of your works on that matter and I must anticipate
24 that your rulings would be consonant to your thoughts as
25 expressed in your commentaries.

1 You have indicated that there is slight difference
2 between the imposition of bringing a jury verdict to a
3 technical finality, and that the jury verdict per se
4 constitutes the conviction, and I am not - -

5 THE COURT: I am just interested in what the
6 sentence is. If there is a long sentence what is the
7 purpose of trying him again in the Federal Court?

8 MR. WARSHOR: Judge, that brings in the Ninth
9 Amendment - -

10 THE COURT: But it is a matter of discretion.

11 MR. WARSHOR: Now you have selective prosecution
12 also. So what's the purpose of this trial if they knew
13 of the alleged activity?

14 THE COURT: That's another problem. The selective
15 prosecution argument in these SIU cases does not seem to
16 me to have much weight. We have tried a whole series of
17 them. I have a jury out now in a conspiracy involving
18 three former SIU members. I tried another three-person
19 conspiracy which resulted in the conviction sometime ago.
20 I tried one before that resulting in an acquittal. And
21 I have taken a number of guilty pleas - -

22 MR. WARSHOR: I might direct myself, your Honor - -

23 THE COURT: - - There is no selective process
24 prosecution argument of any substance in this court.

25 MR. WARSHOR: Might I suggest I am not directing

1 the selective prosecution argument to the SIU circum-
2 stances but to the fact that once the government is well
3 aware that the individual has been convicted in the State
4 Court for the very similar or identical type of crime,
5 even recognizing the dual-sovereignty concepts, there is
6 no reason to prosecute him here. It is a discretionary
7 matter. This is not a selective prosecution defense.

8 Are you presenting as your first motion laches or
9 what? What is it? Speedy trial?

10 MR. WARSHOR: Yes, pre-indictment delay.

11 THE COURT: Pre-indictment delay.

12 MR. GREENBERG: I would like to add something,
13 your Honor - -

14 THE COURT: Are you joining in this motion?

15 MR. GREENBERG: Yes. I have joined in the motion.

16 THE COURT: All right.

17 MR. GREENBERG: I would just like to add this,
18 your Honor, outside of the conspiracy count, it is a two-
19 count - - two substantive-count indictment and the two
20 overt acts and that the conspiracy of the two substantive
21 counts - - two substantive counts are the two overt acts
22 in the conspiracy count.

23 Now, your Honor, as part of the 3500 material
24 that I have received, I have received a search warrant
25 and affidavit by Dominick Butera, that is the deceased

1 police officer on the Quinones count, which is the second
2 count of the indictment. And I am sure it was not given
3 to me just for me to have it in my file. I am sure that
4 there is going to be some representation that this
5 Butera warrant with reference to Quinones had something
6 to do with the alleged taking of the money from Quinones.
7 And Butera of course is named as a co-conspirator in
8 this particular case in the conspiracy count.

9 It seems to me, your Honor, that five years later
10 to the day - - and I will get to that as part of my
11 Statute of Limitations in that count as I have a motion
12 on that, but it seems to me that five years later to the
13 date to indict an individual and charge him with con-
14 spiracy and the substantive count, and then use as part
15 of your proof an affidavit of a police officer who you
16 know is deceased, and who you knew was deceased, and who
17 had died sometime long prior to the indictment - - and
18 we have the date of death here someplace unverified - -
19 but I just would assume - -

20 MR. SCHLAM: September 1975.

21 MR. GREENBERG: September of 1975. And it seems
22 to me, your Honor, to put the defendant at a complete
23 distinct disadvantage. Judge, in presenting any kind of
24 defenses as far as Butera who was allegedly a co-
25 conspirator, as far as his affidavit and search warrant,

1 which may or may not form the basis, or whether the
2 government is going to allege that it is false, or that
3 there was something wrong with it, or just use as a ruse
4 to shake down this individual Quinones. And the govern-
5 ment clearly notes that Butera is no longer available;
6 that he is dead. And you know, it seems to me to just
7 be completely unfair to present - - if that is the case
8 - - and I am not saying it is the government's case, but
9 if it is the government's case everything of the dead man
10 is going to be their case. And then they are going to
11 say - - someone will come in and say Butera and Jiminez
12 and Malone were on the same unit in the SIU, or whatever
13 Butera did, and you know it is Jiminez and Malone, and,
14 your Honor, you just sat through one and you well know
15 the danger of such a kind of approach in this type of
16 case - -

17 THE COURT: What does the government have to say?

18 MR. SCHLAM: Well, your Honor, the government's
19 position is that when the investigation was completed
20 the indictment was returned. Obviously with respect to
21 an individual who is deceased I just don't understand
22 the point with respect to that, but - -

23 THE COURT: Well, who are your main witnesses in
24 this case?

25 MR. SCHLAM: Well, the main witnesses, your Honor,

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1 as far as police officers are concerned are Tange and
2 Fascinella who testified in the King case.

3 THE COURT: When did Fascinella start to turn
4 state's evidence?

5 MR. SCHLAM: I think it was July of 1975, your
6 Honor.

7 THE COURT: Tange?

8 MR. SCHLAM: Tange cooperated with Najari I think
9 in 1972 - - as early as 1972.

10 THE COURT: That is why he got the biggest pension.
11 He started to cooperate first.

12 MR. SCHLAM: Yes, sir.

13 THE COURT: If it's the same grand jury that
14 handed down these indictments that handed them down in
15 the King case.

16 MR. SCHLAM: I believe that's correct, your Honor.
17 I didn't present this case to the grand jury, but I
18 believe that's correct.

19 THE COURT: Who presented this one?

20 MR. SCHLAM: Mr. Puccio.

21 THE COURT: Well, I think I'll reserve decision on
22 this until after the trial. You can present evidence
23 after the trial. Much of it will be a duplicate of what
24 comes in at the time of the trial. I see no point in
25 trying a case twice.

1 What's your next motion?

2 MR. GREENBERG: Your Honor, I have a motion, and
3 this motion is limited to the second count of the indict-
4 ment which happens to be the Jiminez count again.

5 Your Honor, the date of the incident with Jiminez
6 is reputed to be February 20, 1971.

7 THE COURT: The indictment came down when?

8 MR. GREENBERG: February 20, 1976.

9 THE COURT: So that the statute is satisfied.

10 MR. GREENBERG: Well, the cases that I have cited
11 in my notice of motion, the Wellman case and the Klein
12 case, seem to indicate, and I have both cases photostated
13 - - seem to indicate that that day is the day that it is
14 finished.

15 THE COURT: The next day, I would think, the 21st.
16 What does the government have to say?

17 MR. SCHLAM: Your Honor, the government says that
18 five years from February 20th, 1971 is February 20th, 1976.

19 THE COURT: Do you have any cases?

20 MR. SCHLAM: No, I haven't got a case on it.

21 THE COURT: Well, brief it.

22 Decision reserved.

23 MR. WARSHOR: Your Honor, for your edification the
24 second overt act or the first overt act in the conspiracy
25 is also February 20th.

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1 THE COURT: That doesn't make any difference.

2 MR. WARSHOR: Well, from the standpoint of
3 recognizing that this court's position so far as what
4 overt acts must be established for the jury to return a
5 verdict of guilty - -

6 THE COURT: Do you mean under the Statute of
7 Limitations on Count One?

8 MR. WARSHOR: That is right.

9 THE COURT: Well, you will have to brief it. In
10 this last case I charged the jury that the overt act
11 charged had to take place within five years. But I don't
12 believe that that's the law. I think any overt act is
13 sufficient as long as the conspiracy continues. Brief it.
14 You will have time until the charge to brief it because I
15 am not going to grant the motion now.

16 MR. WARSHOR: Your Honor, just on that for a second,
17 I realize there are cases that allow the court to charge
18 that any overt act that is produced if established beyond
19 a reasonable doubt can be taken into consideration in
20 furtherance of the conspiracy. Yet we do have the
21 criminal procedure which says that it should be the overt
22 act alleged in the indictment.

23 Now listening to your charge here - -

24 THE COURT: That's the way I charged here but that
25 was because the government didn't object to it. In any

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1 event there is no basis for deciding it now. I can
2 decide it when I charge. You will have to thoroughly
3 brief it. You know what the issue is. There is no
4 basis for the dismissal because the second overt act took
5 place long after the statute, March - -

6 MR. WARSHOR: Well, what about your position
7 relative to the second count? That could make quite a
8 difference.

9 THE COURT: Brief it.

10 As of now based on the general rules with respect
11 to measuring time, to start the measuring on the 21st
12 day, five years from the 20th is the 20th.

13 MR. WARSHOR: Can we get to the other aspects?

14 THE COURT: But brief it. If you have anything on
15 it I will be delighted to hear it. Maybe the Statute of
16 Limitations on this might be different from all other
17 statutes of limitation possibly. I just don't know
18 enough about it. I never had the issue before.

19 MR. WARSHOR: May we go to the other aspects?

20 THE COURT: We will have to break in five minutes.

21 MR. WARSHOR: Let me see what I can do in five
22 minutes.

23 MR. SCHLAM: You take Count Four and I will take
24 One.

25 MR. WARSHOR: Go ahead. Be my guest.

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1 MR. SCHLAM: Go ahead. Finish up. Then I will
2 finish up at the end.

3 MR. WARSHOR: The real knub of the case, as I said,
4 is the State conviction. It is not only a problem but I
5 think it is the reason we are here. But be it as it may,
6 I would ask for a ruling at this time before we start
7 the trial as to whether or not this court is going to
8 allow the government on its direct case-in-chief to
9 introduce evidence of the prior State conviction.

10 THE COURT: How could I? It is strictly hearsay.
11 On what theory could the government possibly do that?

12 MR. WARSHOR: I am not about to set forth reasons
13 of how or why.

14 THE COURT: Are you offering it on direct?

15 MR. SCHLAM: We do not intend to offer on the
16 direct case the conviction.

17 MR. WARSHOR: Fine, Judge. I have absolutely
18 nothing further to argue on the point any longer.

19 Now let's get to the problem that involves the
20 Palumbo-type - -

21 THE COURT: If he testifies do you want an advance
22 ruling?

23 MR. WARSHOR: Here is the problem that we have - -

24 THE COURT: If there is no sentence I won't see it
25 as a conviction.

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1 MR. WARSHOR: Okay. That problem is solved. So
2 that for the impeachment - -

3 THE COURT: I understand it is Second Circuit law.
4 The law in California is different but I do not agree
5 with the California law.

6 MR. WARSHOR: So if he is not sentenced and he is
7 testifying - -

8 THE COURT: He is not convicted.

9 MR. WARSHOR: Last but not least are the words
10 that really are not coterminous, double jeopardy,
11 collateral estoppel, res adjudicata - -

12 THE COURT: You had better brief it thoroughly.
13 I can't answer that question. It is a complicated
14 question. I don't know anything about the State trial.
15 I don't know enough about the law. The law in this area
16 is extremely complex. Give me a full brief on it.

17 MR. WARSHOR: Have a nice weekend, Judge.

18 THE COURT: I will. I will be doing other work.
19 But I can't do these things off the top of my head.

20 MR. WARSHOR: I am prepared to submit cases to you,
21 I mean at this point, obviously.

22 THE COURT: Not only the cases but the factual
23 basis and the whole business. It is impossible for me to
24 answer any question like that.

25 MR. SCHLAM: Your Honor, the indictment charges

1 that the object of the conspiracy was to steal money.

2 THE COURT: Well, where does it say that?

3 MR. SCHLAM: Deprivation of property, currency, is
4 referred to.

5 Just a moment. In Paragraph Two for example:

6 " . . . The legitimate function of the SIU was
7 perverted and subordinated to the end of obtaining sums
8 of money for its members including the defendants . . . "

9 And I believe in Paragraph Five, your Honor:

10 " . . . It was part of said conspiracy that the
11 defendants and co-conspirators willfully, knowingly and
12 unlawfully used their authority as police officers . . . "
13 etcetera " . . . to obtain money by theft, extortion and
14 other unlawful means . . . "

15 THE COURT: Well, did the grand jury have before
16 it evidence of stealing narcotics?

17 MR. SCHLAM: I believe not, your Honor.

18 THE COURT: Then I won't permit you to prove it as
19 part of that without a superseding indictment unless the
20 defendants will agree because based on that language,
21 which is much more precise than the language in King - -
22 the King language was ambiguous. It said "property" and
23 I limited it for reasons of prejudice. If the grand
24 jury had nothing before it but money and no narcotics,
25 then I assume that is what they meant, money and not

1 narcotics.

2 MR. SCHLAM: I am wondering if your Honor would
3 allow it in in the nature of a similar act.

4 THE COURT: No, unless the defendants would agree.
5 It is just too prejudicial.

6 MR. SCHLAM: Well then I am going to have to ask
7 either that the defense consent to this or that I am
8 going to have to supersede the indictment.

9 THE COURT: I think you had better get a supersed-
10 ing indictment because this business of proof of stealing
11 narcotics for resale is a very serious kind of allegation.

12 What is the defendants' view on this?

13 MR. WARSHOR: Your Honor, on behalf of the accused
14 Jiminez, we are not going to consent. And if and when
15 they do attempt to get a superseding indictment then we
16 will argue that point. But it just kind of reaches a
17 particular stage where on the eve of trial of this
18 indictment just to satisfy the possible proof that they
19 have, to get a superseding indictment, when you have got
20 the Statute of Limitations, and when you have got speedy
21 trial issues, I would hope that it has to stop sometime
22 somewhere.

23 THE COURT: Well, the reason the government has
24 this brought to its attention is because of my ruling in
25 the King case.

1 MR. WARSHOR: That is eight weeks old, Judge.
2 That is eight weeks old.

3 THE COURT: But the rulings came rather late in
4 the game. They weren't sure that it was going to be
5 kept out until the last week.

6 Well, what's going to be the effect of the
7 superseding indictment with respect to the Statute of
8 Limitations?

9 MR. SCHLAM: Well, your Honor, I think - - I
10 really don't know what the effect will be. I will have
11 to study it and see whether the saving provision might - -
12 I don't even know if that - -

13 MR. WARSHOR: I have researched that aspect. I say
14 from the top of my head that there is no tolling of the
15 statute by the filing of the one instrument.

16 THE COURT: You had better brief the point. I may
17 be wrong on the narcotics problem. But it does seem to
18 me if you tell me there is nothing about narcotics
19 stealing in the - - you have gone through the grand jury?

20 MR. SCHLAM: Yes. Your Honor, the only thing I
21 would say is that under the ordinary principles of
22 similar acts, this seems to be very similar.

23 THE COURT: It is a different thing to shake down
24 money or to shake down narcotics and sell it - -

25 MR. SCHLAM: Well, narcotics are money in effect.

1 THE COURT: No. The jury may acquit a policeman
2 of shaking down money from a narcotics dealer and will
3 never forgive him for shaking down narcotics and selling
4 it.

5 MR. SCHLAM: This is going to be - -

6 THE COURT: I think you had better consider the
7 matter from that point. I am not making the final
8 decision. But I would like a brief. I would like some
9 full preliminary discussion on it. I will see you
10 Tuesday. That will give you the weekend. Monday I will
11 be trying the King case. I do not think they are coming
12 in. I will have to be away part of Monday morning.

13 MR. SCHLAM: So basically, your Honor, if necessary,
14 we may have to supersede the indictment.

15 THE COURT: Well, you had better consider it. It
16 is a very complicated decision. I will see you all on
17 Tuesday.

18 Do you want to consider this case as started?

19 MR. WARSHOR: Yes, please.

20 Your Honor, with respect to superseding indict-
21 ments, do you have any particular views on Costello
22 against the United States?

23 THE COURT: Yes, I have views on it.

24 MR. WARSHOR: To send in an agent five years
25 later to testify to everything that was once before this

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1 grand jury - -

2 THE COURT: Well, I have written on Costello but - -

3 MR. WARSHOR: I think, if I am correct, there was
4 a reversal - -

5 THE COURT: No. It was one of the few cases I
6 wasn't reversed on, that opinion.

7 But superseding indictments present special kinds
8 of problems. And it is a big problem for the government.

9 MR. GREENBERG: Judge, can I suggest 11:00 o'clock
10 on Tuesday?

11 THE COURT: The calendar is completely fouled up
12 because of the King case which has been on for so long.

13 MR. WARSHOR: I couldn't believe I am back in
14 this case and you are on trial in the King case.

15 THE COURT: What do you mean?

16 MR. WARSHOR: You just didn't want to give us that
17 two-week adjournment eight weeks ago.

18 THE COURT: Well, you got it.

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1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

3 -----X
4 UNITED STATES OF AMERICA

5 -against-

76 CR 233

6 MAXIMO R. JIMENEZ,

7 Defendant.
8 -----X

9
10 United States Courthouse
11 Brooklyn, New York

12
13 September 17, 1976
10:30 o'clock P.M.
14

15
16 B e f o r e :

17 HONORABLE JACK B. WEINSTEIN, U.S.D.J.
18
19

20
21
22 STEVEN A. TESSLER
23 OFFICIAL COURT REPORTER
24
25

Appearances

DAVID G. TRIGLER, ESQ.
United States Attorney
for the Eastern District of New York

BY: JOHN SCHLIM, ESQ.
Assistant U.S. Attorney

MICHAEL WASHOR, ESQ.
Attorney for Defendant Mario Jimenez

ST/tk

1 THE COURT: Have you had an opportunity to read
2 the pre-sentence record and discuss it with your
3 defendant?

4 MR. WASHOR: Yes, I have, your Honor. I have
5 a few objections.

6 I take objection to several of the objections
7 in the report, the problems of the objections and
8 bringing it to the Court's attention is somewhat like
9 telling the Court to pay no attention to certain
10 aspects, yet in order to do that would cause to be
11 specific a drawing it directly to your attention.

12 Might I suggest, the first instance there were
13 statements in the report relative to the defendant
14 being involved in the distribution of narcotics.
15 Without minimizing the present charges, might I suggest
16 the statement and, if I'm accurate from my notes, that
17 was not produced, because the United States Attorney's
18 office felt there was a lack of credibility, recalling
19 the witnesses that brought forth the statements, so,
20 in one vein while I brought it to your attention I
21 am asking you not to take it into consideration.

22 There is no proof of that in whatever informa-
23 tion was conveyed, caused it to be incorporated in
24 the report quite apparently.

25 THE COURT: I wouldn't consider any evidence

1 which was before me at the trial. There was some
2 evidence suggesting that he held out some narcotics
3 before me at the trial, if I recall, I will not consider
4 anything else than what was actually introduced.

5 MR. WASHOR: I don't have to allude to that
6 aspect of the report.

7 I suggest to your Honor, there is conspicuously
8 absent certain background material of the accused, more
9 particularly, the great pains were taken to detail the
10 impropriety, it seems that the scale on which the
11 Court is supposed to rate the equities left out the
12 entire background within the Police Department, left
13 out the entire area of the man's life.

14 THE COURT: He testified, as I recall, and as I
15 recall you very ably elicited much of this good back-
16 ground, including all of his good works on the police
17 force, there weren't any questions when he was an
18 armed cop he was a very good cop.

19 MR. WASHOR: There are areas of valor and courage,
20 a little bit above and beyond which are not within the
21 purview of the report.

22 THE COURT: He was able, a brave policeman, and
23 he did a lot of very fine things. As I recall, there
24 was a war record, also very favorable war record and
25 a good family record. Except for the fact that we have

1 have here, which is very disturbing, he would have
2 been an estimable member of the community. And when
3 once again there is reference to the defendant, if I
4 may quote the language, "snorting cocaine in the
5 capacity of an undercover police officer."

6 I wouldn't assume that, I wouldn't assume that
7 he took drugs.

8 MR. WASHOR: Suffice it then to say you have
9 indicated you are going to consider favorable inspec-
10 tion as well as those matters which you have in your
11 recollection, was brought forth during the trial and
12 the allegations in the report, I think it's proper
13 preference and perspective, am I accurate?

14 THE COURT: That is correct, since the case was
15 fully tried I'm going to rely much more on the record
16 of the trial than on anything in this report.

17 MR. WASHOR: Let me bring another matter to your
18 attention. It's a legal concept, you can well under-
19 stand as being privy, that is, myself, to this Court's
20 sentencing of other members of the Special Investigating
21 Unit, I from that point more so than the verdict of
22 the jury have been very much perturbed, I say this
23 candidly to the Court so you understand the reason for
24 my presentation. Of course, when a member of the
25 advocacy system finds he is up against a different

1 problem, the problem being that I understand your
2 Honor's attitude for the imposition of serious sentences
3 in similar, but anything but like identical circumstance,
4 it has caused me to almost in a split sense go beyond
5 the call of the representation and seek out a legal
6 concept that would provide room for your Honor to
7 exercise your discretion and be more lenient under
8 circumstances as we now have, notwithstanding the
9 nomenclature of the crimes charged, the defendant was
10 convicted more particularly of involving himself with a
11 gentleman by the name of Bolen, another person by the
12 name of Arnie, wherein these people were in possession
13 of a good deal of money, whether it was eight thousand
14 or ten thousand dollars, I don't remember the exact
15 amount, frankly.

16 As a result of which they were taken down to the
17 station house and I don't think there is any other way
18 to approach the analysis of the facts, other than to
19 say there were negotiations so that the officer could
20 wind up with monies that were illegal. There were
21 disputes to the amounts, how much should be given, how
22 much should not be given, whose money it was, but full-
23 scale negotiations obviously on an unsophisticated
24 level. You have got the bribery --

25 THE COURT: I don't think they're unsophisticated,

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1 think they're highly sophisticated.

2 MR. WASHOR: I am not talking about negotiations
3 between two lawyers to settle the case.

4 THE COURT: C-r-u-d-e, crude.

5 MR. WASHOR: Judge, you see the word you are
6 using I suggest is misapplied, but that, of course, is
7 difference of opinion.

8 THE COURT: That is my interpretation of the
9 evidence.

10 MR. WASHOR: What I am suggesting to your Honor,
11 that this is a crime that involves concerted actions,
12 concerted between the person Bolen and Armin.

13 THE COURT: These fellows were crokks, the lowest
14 scum of society, and this defendant cooperated.

15 MR. WASHOR: They concerted -- I understand
16 Warton's rule, I am now bringing to the Court's atten-
17 tion and asking your Honor why you cannot change the
18 substantive application of the verdict at this stage
19 to consider at least from the point of sentence that
20 there should be a merger between the conspiracy charge
21 as well as the substantive charge here.

22 The concerted action on the underlying facts as
23 a result of which I suggest that the conspiracy charge
24 and substantive charge should merge, they are not
25 really separate and distinct.

1 THE COURT: I don't agree with that at all.

2 MR. WASHOR: Now, your Honor, regarding the
3 defendant, Max Jimenez --

4 THE COURT: I don't think the evidence supports
5 that.

6 MR. WASHOR: Regarding the imposition of sentence,
7 what has to be done and what should be done.

8 I have to speak my peace to the Court on behalf
9 of the accused, one, because I am obligated, two,
10 because I am concerned. I know you have to impose a
11 sentence, a jail sentence, and as you have indicated,
12 as a deterrent problem we have here, that has been
13 accomplished already. Not merely because I say so,
14 but because it's a fact.

15 Severe jail sentences have been doled out in
16 the past. It would seem ludicrous in this day and age
17 with the news media knowing what goes on in the court
18 rooms, and the sophisticated approach of the people
19 that read the media, more particularly other members
20 of the Police Department, to believe that what has
21 happened in the last handful of years, three, four,
22 five years is not a deterrent. I say to you honestly,
23 Judge Weinstein, if it has not acted as a deterrent
24 already, you're almost talking to a brick wall when you
25 address the public in the way of severe sentences,

1 because if they haven't learned by now, they never will.
2 So, the imposition, he is last on the list, the last
3 of the Indians.

4 THE COURT: He is not the last, but I think they
5 have a few more on file, don't you?

6 MR. SCHLAM: I can think of one offhand, your
7 Honor.

8 THE COURT: They may not get them for these
9 crimes, but they have on fact problems and others.

10 MR. WASHOR: When I say the last, I don't mean
11 literally the categorical last, I mean the last of
12 the standpoints of the investigative processing. It's
13 at the tail end would be a better way of defining it
14 to the Court. I suppose that seems to be the most
15 important factor to your Honor, because you have
16 demonstrated compassion, and understanding, of how this
17 affects the individual's family, the children.

18 I have listened to your Honor most sincerely
19 indicate that sometimes it would be so much nicer if
20 you could obtain acquittals and make it easier, not
21 just for the Court but for all the others that have
22 to pay the most serious consequences of long incarceration,
23 that is the frustrating conflict I am dealing
24 with here. Instructing your Honor, I say that sincerely,
25 I have difficulty understanding why the Court

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1 does not realize that long jail sentences do not really
2 accomplish what you have in mind, the deterrent to
3 others.

4 You see, we have a situation with Jimenez where
5 we do have good on one side of the scale, and we have
6 the kind of good on one side of the scale which is left,
7 toed its mark. The number of arrests, or as you
8 categorize it, when he was good he was very, very good
9 and when he was bad apparently he was very bad. The
10 point is weighing it, you can't disregard completely
11 what he has done to bring about some good deeds. Many
12 good deeds. Members of the Police Department are being
13 killed by those on the outside that really just snub
14 their noses and pay little if any attention whatsoever
15 to law enforcement.

16 We do have an individual before you that has
17 demonstrated through actions, not words, which very
18 often are categorized as cheap, he has crawled on his
19 belly, he has been wounded, he refused to follow orders
20 of a brother officer who was wounded, he did not abandon
21 his duty, he did not dishonor the badge, or the others,
22 when he was ready, willing and able to have himself
23 killed, and how much closer rhetorically can a person
24 get in this world to actual death than being wounded.

25 You're familiar with the report, you're familiar

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1 with the background of the particular case that I am
2 referring to. You know I am sure that this man has
3 infiltrated during the good years as a cop to the most
4 difficult concepts of society, the militant society,
5 those that go much against our government, refers to
6 those citizens that merely violate the law because of
7 greed.

8 I have spent a lot of time with Max Jimenez
9 prior to being engaged as his Counsel. I have spent
10 time with him when he was tried on the State case, I
11 spent time prior to that. I knew Jimenez prior to that,
12 also.

13 I can suggest that there have been many discus-
14 sions relative to attitude, more important, relevant to
15 justification and rationalization which most people
16 seem to do when they have a problem, and probably the
17 one phrase that I can bring to your attention stated to
18 me this very morning in my office by Jimenez, and it
19 sums it up pretty well as to what makes him run. And
20 he said in no uncertain words to me, if he had to do it
21 all over again he would not be charged with a crime, and
22 I know what he meant by that.

23 He didn't mean he would not get caught, he meant
24 he would not have let the peer pressure, the greed, the
25 reason that people do wrong things, the overpower, the

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1 good he had done, and I suppose this is the kind of
2 plea on sentences where your Honor realizes that also,
3 at the point of trauma there seems to be some sign of
4 contrition, but, Judge, suppose I just suggest to you
5 that it's never too late for an individual to recognize
6 the error of his ways. And it's never too late, hope-
7 fully, for someone to hope to rehabilitate themselves.
8 And, I ask you to weigh the equities.

9 (continued on next page)

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MR. WASHOR: I don't appear here this morning

in anticipation that the Court is going to pin a medal on him, nor do I expect it to give him a minor jail sentence. What he has suffered to this point, even with a lenient sentence, will leave a mark that remains with him, his wife and children, for the remainder of his life, but it's not your fault, or the Prosecution's fault. The worst scar a man must bear is the one he has caused to be borne on his body and the ones he has loved. He has got the intellectual ability to understand that.

Too much time, too long a time with the hope that it will act as a deterrent will do more to damage the individual, and I do suggest the ends do not justify the means. I thought so myself at one time as I was growing up, and I ask you to take consideration for the means.

We know he must go to jail, we know a sentence must be imposed of jail, but in so doing, Judge, we have got such wide latitude. Judge Weinstein, there are many others that are interested in the outcome of this case, those that are fearful that you could impose one, six, seven, ten, eleven years, those that don't know if he's going to get a light sentence or not, those who are going to use this as a deterrent and those

1 going to use the sentence imposed by you of the indi-
2 cation that there is mercy within the confines of a
3 sentence, this is not taking you as a judge, per se,
4 I have reason to believe that is brought to my atten-
5 tion, there are several letters written to the Court.

6 He had a letter written to the Court under the
7 defendant's wife, which I can under oath, as he can,
8 doesn't even know the contents of very much of our
9 objections.

10 THE COURT: It certainly didn't hurt. All the
11 letters show that this defendant has established rural
12 roots in the community, many people that respect him
13 and it shows that he has done many good things, there
14 is no question about it. A person that is all bad
15 doesn't get this kind of support, there's obviously
16 people that love him and will be badly hurt if he goes
17 to jail.

18 MR. WASHOR: We understand that they must bear
19 the brunt of their love, we're not ungrateful for that,
20 we're not asking this Court to suspend sentence, it
21 would be unrealistic. We're asking not to impose on
22 the defendant such a severe sentence that the conse-
23 quences put him in a position where he has no alterna-
24 tive when he comes out and does irreparable harm and
25 damage.

1 This is not the type of circumstance that we
2 can reasonably anticipate is a reoccurring event within
3 the confines of the City of New York, or within the
4 Police Department. I would hope not, just as a citizen,
5 not only as an advocate.

6 I think what has been done up to this point is
7 more than a lesson to those whose inclinations lead
8 down the road of improprieties. And I am asking not
9 only on behalf of his children, but on behalf of the
10 problem brought in here. He has overcome an awful lot.
11 He has no choice but to overcome whatever sentence you
12 dole out, don't make it so insurmountable it serves no
13 purpose, Judge Weinstein, other than a whipping, and I
14 submit to you, self-flagellation is worse than being
15 whipped by any mind and his experience, I ask you to
16 try to be as lenient as you can.

17 THE COURT: Mr. Jimenez, you know what the
18 situation is. You have been convicted by a jury, so
19 you have a right to appeal. If you can't afford an
20 attorney, the Government will pay for the attorney and
21 whatever other expenses are required.

22 THE WARDEN: May I interrupt your Honor to aid
23 you in this area? I have explained to Mr. Jimenez and
24 I am obligated under the law to represent him. I am
25 going to do so because without remuneration --

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1 THE COURT: You are on title. Aren't you the
2 Second Circuit panel?

3 MR. WASHOR: Not on the assignment aspect.

4 THE COURT: How did you get on on a situation
5 like that? I think it seems senseless under the
6 present conditions for you to serve on an appeal.

7 MR. WASHOR: I say to you, most candidly, Judge,
8 really, finance is not the only thing that dictates
9 provisions.

10 THE COURT: You do what you wish.

11 MR. WASHOR: I do request aid financially from
12 the standpoint of the ordering of the minutes, et
13 cetera.

14 THE COURT: Didn't we have copy?

15 MR. SCHLAM: Yes, sir.

16 THE COURT: Having it and having it available
17 for us to use.

18 We'll issue you any order you need. If you
19 can't arrange to get an order, I will submit an order
20 of lack of funds and I will give it to you.

21 I will be happy to give to you anything I can
22 to that. Anything else on that matter; you want to
23 add anything?

24 THE DEFENDANT: No, sir. At this point I am
25 willing to accept the Court's statement that they would

1 consider both aspects of the coin.

2 THE COURT: It's a difficult sentence that I
3 recommend, because you do have a good record, you come
4 from difficult background, you pulled yourself up,
5 done good, done a lot of good, made a good record for
6 yourself. You're even working now, you're the kind
7 of person we want in our society.

8 That is not my problem, I am not sentencing
9 you to rehabilitation or incapacitation or anything
10 like that. My problem is that we have an order here,
11 pattern of crimes, and we have to have a pattern of
12 sentences that makes some sense. The pattern has
13 generally been that those who have stood trial and not
14 cooperated have got eight years. Those who have
15 cooperated at the trial, or before trial, have received
16 consideration, sometimes I believe that consideration
17 is much too great. One of the key culprits here, a
18 number of key culprits, is giving hard attention to
19 the others that are back on the force, haven't been
20 punished at all.

21 That is an unfortunate aspect I have nothing
22 to do with. In your case we have a conviction. You
23 did testify before the jury. In my opinion you lied,
24 the jury believed you lied. So, if all the cases were
25 then tried on any scale, you come in with the possibility

1 of the highest sentence, but if I am going to be
2 consistent at all with the pattern I set down, I
3 understand it's harsh. When we're dealing with appear-
4 ance we're dealing with that pattern that I know I am
5 going to hurt you and your family. That I am doing it
6 for other sentences, count one, nine years, count
7 three, one year to run concurrent.

8 In other cases where there has been assignment
9 of cooperation I have reduced the sentence. Unfortu-
10 nately, this defendant is in a position where he says
11 he is at the end of the line. On the other hand, if
12 there is any sign of cooperation to the extent of
13 cooperation is possible, I will consider it as I have
14 in the other cases and consider a reduction, motion
15 for reduction can be made within a hundred twenty days
16 after mandate comes down.

17 MR. WASHOR: Your Honor, question of appeal,
18 it's been indicated to you about our appeal. I suppose
19 we're up to the point whether your Honor would consider
20 bail pending appeal.

21 THE COURT: I'll put him on bail pending appeal,
22 it's a substantial case and a case tried as hard as
23 this over some days there is definitely errors in the
24 record, there is never a perfect record particularly
25 in a case like this. So, if the Appellate Court wants

1 to reverse, there is reason to reverse in the case.

2 I think you ought to be out on bail pending
3 appeal, any objection?

4 MR. SCHLAM: No objection.

5 THE COURT: I am not saying there are errors,
6 I am not inviting the importance of appeals to reverse,
7 I am saying there is a chance of reversal.

8 MR. WASHOR: May I allude to something?

9 You have indicated that there has to be a
10 pattern, whether I agree or disagree at this point, I
11 must respect your opinion.

12 THE COURT: I am not sentencing on the basis of
13 the individual anymore for deterrence, he is being
14 sacrificed, in a way, for the good of society. I don't
15 like it, it's a terrible position because it's put in
16 here. It's a kind of a blackmail situation where we
17 sentence and threaten high sentences in order to induce
18 cooperation, the Court and Prosecutor and the criminal
19 elements are all in cahoots. They're all part of the
20 defense Counsel, unfortunately we're all engaged in a
21 criminal, semi-criminal activity. I don't like it,
22 it's the situation. It's the only way we can get
23 cooperation in these cases is the threat of high sent-
24 ences.

25 The Court is paid off to become a party of this

1 conspiracy, chase down to get them to court and reducing
2 sentences and taking pleas.

3 You understand it, I understand it, I am not
4 proud of my activity, but that is what happens. I
5 would have no objection at all to the Court of Appeals
6 reverse, and require the re-sentence on the grounds
7 that this case -- I'll make a point but I have to
8 exercise discretion appropriately -- we can get some
9 expedience on it, fine. It's the position of the
10 Court, I try to have a pattern, somebody's cooperated
11 early and the Government has agreed on exposition
12 without jail, and they have in some cases, I follow
13 that. Some cases I think are accessible with time.
14 Where they pleaded without such arraignment, they get
15 jail, a rather light jail. When they haven't cooper-
16 ated, they get heavy jail terms. When they cooper-
17 ated subsequently, I reduce it, but not as much as at
18 the outset.

19 One case I gave the man ten year term, there
20 were actually, actually cooperated. Jimenez at the
21 time this is a very different area. If we can get
22 some guidance from the Court of Appeals, and if I am
23 wrong in becoming a party of this pattern of compel-
24 ling people to cooperate, I would like to know and
25 that I am not proud of the position.

1 MR. WASHOR: It's just two aspects. Firstly, if
2 my recollection is correct, several of the other
3 sentences imposed were only using this on a non-prose-
4 cutions area, since you said that is the basis of the
5 imposition of sentence, they received a sentence of
6 five years and one year to run consecutively.

7 THE COURT: Those are the maximum, as I recall.

8 MR. SCHLAM: The maximum on a civil right
9 conspiracy is ten years.

10 THE COURT: I forget the situation.

11 MR. SCHLAM: They were different in the case
12 Mr. Washor refers to, some of the defendants were not
13 charged in the same count.

14 THE COURT: Even some of these cases are
15 difficult, but I have generally followed these cases
16 and you can find distinctions and there are all kinds
17 of special circumstances involved. But, the general
18 pattern has been a plea early with cooperation, very
19 light sentence. A plea without cooperation, substan-
20 tial sentence. A trial without cooperation, a very
21 substantial sentence. A subsequent cooperation, a
22 reduction of sentence. I think that is the general
23 pattern. Your man comes in without any cooperation,
24 tried by jury, found guilty, a very serious aspect,
25 testified and lied. He comes in at the very top.

1
2 MR. WASHOR: You see the problem I have. I
3 have spent really so many years with reading your
4 writings where you really are the backbone to the
5 Fifth Amendment, the right to remain silent. You are --

6 THE COURT: I agree. He has got a right to
7 remain silent, but if he comes in and he is the Govern-
8 ment's undercover, other crooks and thieves, he's
9 entitled to consideration.

10 I couldn't hold it against him that he was
11 silent. I don't hold against him he was convicted,
12 went to trial, whether he testified. But I am not going
13 to ignore the fact that he did not cooperate.

14 MR. WASHOR: There is nobody left.

15 THE COURT: Let him tell them something. You
16 come in and tell me what they told him and I will
17 consent. I don't need the Government to tell me they're
18 satisfied with his cooperation.

19 MR. WASHOR: We're really confronted with a
20 unique problem, most unique. Unique in the sense a
21 complete catharsis of which a defendant might be caused
22 to go through would be just a repetition of all the
23 trials that transpired here.

24 THE COURT: That isn't so.

25 MR. WASHOR: There is no evidence to the contrary,
that is our problem.

1 THE COURT: You still haven't told us what he
2 known about the situation.

3 MR. WASHOR: Your Honor, what bail would the
4 Court impose?

5 THE COURT: What is the present situation; out
6 on his own recognizance?

7 MR. WASHOR: I couldn't believe he is going to
8 run away, he is a family man, you have got a job now,
9 haven't you?

10 THE DEFENDANT: Two jobs.

11 THE COURT: Responsible citizen?

12 MR. WASHOR: I am not accusing you of joining
13 yourself --

14 THE COURT: Get a proposal, that isn't our
15 decision. I don't have any desire to keep this man
16 in jail.

17 MR. WASHOR: All right, your Honor. It's ROR
18 on the appeal. We'll file the necessary papers and
19 with your permission I will be in contact with your
20 office so we can make arrangements for the report.

21 THE COURT: Whatever I can do to assist you.

22 (Whereupon, at this time the Criminal Case
23 for Sentencing was concluded.)

24 * * *

25

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA :

-against- :

76-CR-133

MAXIMO JIMINEZ and :
JAMES MALONE, :

Defendants. :

----- x

United States Courthouse
Brooklyn, New York

June 7, 1976
10 o'clock, A.M.

B e f o r e :

HONORABLE JACK B. WEINSTEIN, U.S.D.J.

MICHAEL MIELE
OFFICIAL COURT REPORTER

1
2 DAVID G. TRAGER, ESQ.
3 United States Attorney
4 for the Eastern District of New York

5
6 BY: PETER SCHLAM, ESQ.
7 Assistant U. S. Attorney

8
9 MICHAEL WASHOR, ESQ.
10 Attorney for Defendant Jiminez

11
12 HARVEY GREENBERG, ESQ.
13 Attorney for Defendant Malone
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1 THE CLERK: Case on trial.

2 MR. SCHLAM: I have an application before the
3 jury comes in. While waiting out in the hallway I
4 noticed that Mr. Jiminez' wife was crying. I just
5 want to ask whatever spectators are going to be
6 present during the charge, maintain their composure.
7 If they cannot do so, they should not sit in the
8 courtroom at all.

9 MR. WASHOR: The Government brought this to my
10 attention before you took the bench. I have admonished
11 the family of the defendant. They assured me they can
12 maintain their composure. There should be no problem.

13 THE COURT: Thank you very much.

14 Bring in the jury.

15 (Jury present.)

16 THE COURT: Good morning, ladies and gentlemen.
17 Nice to see you all this morning. I am now going to
18 tell you what the law is. I want you to follow my
19 instructions. You alone have the responsibility for
20 finding the facts and for determining guilt or
21 innocence. I have no view as to the guilt or innocence
22 of these defendants. Nothing that I have said or done
23 during the course of the trial should be taken by you
24 as indicating any such view. The rulings that I have
25 made were determined on the basis of procedural matters

1 that are of no concern to you. My sole concern now
2 and throughout the trial has been that you decide the
3 case fairly in accordance with the law and the
4 evidence before you, and without sympathy or favor to
5 any party. ~~Everyone~~ here is entitled to equal justice.
6 The fact that this case was brought in the name of the
7 United States does not entitle the prosecution to
8 any benefits. The indictment is merely an accusation
9 in writing. It is no evidence of guilt and it is
10 entitled to no weight in your determination of the
11 issues in this case. Each of the defendants have
12 pleaded not guilty. That means that the Government
13 has the burden of proving their guilt beyond a reason-
14 able doubt as to each individually with respect to
15 each element of each of the crimes they're accused
16 of having committed. The burden never shifts throughout
17 the trial. A defendant does not have to prove his
18 innocence. He does not have to submit any evidence
19 at all. A defendant need not take the witness stand
20 and you may draw no inference unfavorable to him
21 because he does not testify.

22 You may not consider the fact that a defendant
23 did not testify.

24 A presumption of innocence remains with a
25 defendant throughout the trial and must not be considered

1
2 by you in your deliberations.

3 A reasonable doubt means a doubt sufficient
4 to cause a prudent person to hesitate to act in the
5 most important affairs of his or her life. A reason-
6 able doubt may result from the evidence you heard or
7 the failure to produce evidence.

8 Finding a person to be guilty of a serious
9 crime is, of course, an important and serious occasion
10 in your life and in the life of those before you, and
11 you will consider the seriousness of the matter in
12 determining whether you have a reasonable doubt.

13 Nevertheless, if at the end of your delibera-
14 tions you are convinced beyond a reasonable doubt that
15 a defendant is guilty of the crime charged, then you
16 should find him guilty of that crime. It must be
17 established beyond a reasonable doubt that a defendant
18 acted wilfully and knowingly before he may be found
19 guilty of a crime.

20 An act is wilful and knowing if it is done
21 intentionally, deliberately, and voluntarily, with the
22 specific intent to accomplish something the law
23 forbids -- that is to say, with the bad purpose to
24 disobey or disregard the law and which the defendant
25 recognizes he can be criminally prosecuted for.

1
2 An act is not knowing if it is committed
3 because of a mistake, carelessness, negligence,
4 stupidity, or some other non-criminal reason.

5 The state of mind of these defendants will
6 have to be determined by you based upon what you have
7 heard and what you will see in examining the documents.

8 One may not however wilfully, intentionally
9 remain ignorant of a fact important and material to
10 his conduct, in order to escape the consequences of
11 the criminal law.

12 This indictment charges three distinct counts
13 or crimes. You must consider each of them separately
14 as to each defendant. In other words, in effect, you
15 are deciding six cases here.

16 I will first read each count to you and then
17 after I read the count, I will explain what the law
18 is that applies to that count. The first count is the
19 conspiracy count. It charges that the defendants
20 and others participated in an illegal conspiracy and
21 reads as follows:

22 "Between the years 1969 to 1971 there was an
23 investigative unit within the Narcotics Bureau of
24 the New York City Police Department, entitled, The
25 Special Investigations unit, the SIU.

1
2 The jurisdiction of SIU was city-wide and its function
3 was to gather evidence for the arrest and prosecution
4 of major narcotics violators. During the aforesaid
5 period, Maximo H. Jiminez and James H. Malone, the
6 defendants, and Dominick Butera, now deceased and
7 named herein as a co conspirator and not as a defendant,
8 were members of SIU and, as such, were Police Officers
9 acting under color of the law of the State of New York.

10 During the aforesaid period the legitimate
11 function of the SIU was perverted and subordinated to
12 the end of obtaining sums of money for its members,
13 including the defendants, through theft and extortion
14 from narcotics dealers and suspects who were the
15 subjects of their investigations. In short, the
16 principal purpose of investigations conducted by
17 members of SIU, including the defendants, was not to
18 convict those illegally engaged in the narcotics
19 trade, but to enrich the members of the SIU through
20 repeated violations of the Constitution of the United
21 States, the laws of the State of New York and the
22 regulations of the Police Department of the City of
23 New York.

24 The illegal activity of the various members of
25 the SIU, including the defendants, was undertaken with

1
2 the knowledge and consent of the other members of
3 SIU and could not have succeeded without their joint
4 operation.

5 On or about and between the first day of
6 January 1969 and the 30th day of December, 1971, both
7 dates being approximate and inclusive, within the
8 Eastern District of New York and elsewhere, for the
9 purpose of carrying out the illegal SIU activities
10 heretofore described, Maximo H. Jiminez and James H.
11 Malone, the defendants, together with Dominick Butera
12 and other co-conspirators known and unknown to the
13 Grand Jury, wilfully, knowingly and unlawfully
14 combined, conspired, confederated and agreed together
15 and with each other to use their authority as Police
16 Officers acting under color of the law of the State
17 of New York to injure, oppress, threaten and intimidate
18 citizens in the free exercise and enjoyment of their
19 rights and privileges secured to them by the
20 Constitution of the United States.

21 It was part of said conspiracy that the defendants
22 and their co-conspirators wilfully, knowingly and
23 unlawfully would use their authority as police officers
24 acting under the color of the law of the State of
25 New York to obtain money by theft, extortion and other

1
2 unlawful means from Ismael Quinones, John Boland and
3 William Armond, who were citizens of the United States,
4 thereby injuring, oppressing, threatening and incrimi-
5 nating them in the free exercise and enjoyment of
6 a right and privilege secured to them by the
7 Constitution of the United States, namely, the right
8 not to be deprived of property without due process of
9 law.

10 It was further a part of said conspiracy that
11 the defendants and their co-conspirators would conceal
12 the existence of the conspiracy and would take steps
13 designed to prevent disclosure of their activities.

14 In furtherance of the conspiracy and to effect
15 the objects thereof, the following overt acts, among
16 others, were committed in the Eastern District of
17 New York and elsewhere.

18 First, on or about February 20, 1971, defendants
19 Jiminez and Malone, and other members of SIU divided
20 among themselves approximately \$4,000 taken from the
21 apartment of one Ismael Quinones in Brooklyn, New York.

22 Second, on or about March 18, 1971, defendants
23 Jiminez and Malone and co-conspirator Butera had a
24 conversation with John Boland and William Armond at
25 the 114th Precinct in Queens, New York."

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1
2 If these acts are true, this would be a vio-
3 lation of the United States Code, Section 241.

4 Now, I will tell you in a moment about overt
5 acts, but Section 241 provides as follows:

6 "If two or more persons conspire to injure,
7 oppress, threaten or intimidate any citizen in the
8 free exercise or enjoyment of any right or privilege
9 secured to him by the Constitution or laws of the
10 United States, or because of his having so exercised
11 the same, they shall be guilty of a felony."

12 There are four elements, if you analyze the
13 statute which the Government has to prove beyond a
14 reasonable doubt.

15 First, the defendants must have been engaged
16 in a conspiracy.

17 Second, the object of the conspiracy must have
18 been to injure, oppress, threaten or intimidate the
19 victim in the exercise of a right or privilege secured
20 by the Constitution. The Constitutional right that
21 the defendants are accused of preventing citizens
22 from freely exercising is the right not to be deprived
23 of property without due process of law. A conspiracy
24 to violate this constitutional right would constitute
25 a federal crime.

1
2 Third, the victim of the conspiracy must have
3 been a citizen of the United States.

4 A person born in Puerto Rico is a citizen of
5 the United States.

6 Fourth, there must have been an intent on the
7 part of the defendant, wilfully to prevent the victim
8 from freely exercising a right or privilege secured by
9 the Constitution or laws of the United States.

10 Now, the first element is the conspiracy element.
11 That required you to find two things:

12 First, there were two or more persons involved.
13 A person cannot enter into a conspiracy with himself.
14 Besides the two defendants on trial, it is charged
15 that Butera was a co-conspirator.

16 Second, that the two or more persons wilfully
17 and knowingly conspired or agreed.

18 If you find that there was no agreement among
19 any of the co-conspirators referred to in Count One,
20 you may not find that a conspiracy existed. The first
21 thing you have to ask yourselves is whether there was
22 a wilful and knowing agreement.

23 In order to find such an agreement, it is not
24 necessary that you find that persons charged met together
25 and entered into an express or formal agreement, or that

1
2 they stated orally or in writing that the scheme was
3 or how it was to be achieved. It is sufficient to
4 show that they came to a mutual understanding to
5 accomplish the unlawful act.

6 The evidence must show beyond a reasonable doubt
7 that the conspiracy was knowingly formed and the
8 defendants wilfully participated in the unlawful plan
9 with the intent to advance or further some object or
10 purpose of the conspiracy. Here, of course, to prevent
11 citizens from freely exercising their rights under
12 the constitutional laws of the United States, as I
13 will explain them in a moment.

14 The agreement may be inferred from the circum-
15 stances and the conduct of the parties as revealed by
16 the evidence. More direct evidence than this is
17 usually not available, since a conspiracy is ordinarily
18 characterized by secrecy. Nevertheless, suspicion
19 cannot be a substitute for evidence and mere similarity
20 of conduct does not establish a conspiracy.

21 (Continued on next page.)
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23
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25

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2 To be a member of a conspiracy the defendant
3 need not know all of the details of a conspiracy,
4 nor all the parties to it, nor all the means by which
5 the objects were to be accomplished. Each member
6 of a conspiracy may perform different and separate
7 acts. It is necessary, however, that the Government
8 prove beyond a reasonable doubt that the defendant
9 was aware of the common purpose and that the common
10 purpose was criminal in nature and that the defendant
11 was a willing and knowing participant with the intent
12 to advance the purpose of the conspiracy.

13 A single conspiracy over a period of almost
14 three years is charged, not a series of individual
15 conspiracies. You need not find that the conspiracy
16 covered the entire three years or that it was limited
17 to the years in question, but it must be more than a
18 series of independent discreet conspiracies or
19 arrangements. If there was no over-all conspiracy,
20 but only a series of discreet conspiracies, the
21 defendants must be acquitted.

22 You may find a defendant participated in a
23 conspiracy, if the Government proves beyond a
24 reasonable doubt that he entered the ongoing conspiracy
25 knowing that it was a continuing conspiracy. A

1
2 defendant need not be a member of a conspiracy from
3 its inception or to its end, so long as all the
4 elements of the crime are proven as to him beyond a
5 reasonable doubt.

6 A single act may be enough to draw a defendant
7 within the ambit of the conspiracy, provided you are
8 convinced beyond a reasonable doubt that the defendant
9 knew of the conspiracy and associated himself with it,
10 intending that it succeed.

11 The second element of Section 241 pertains to
12 the object of the conspiracy. You must find that the
13 object of the conspiracy was to injure, oppress,
14 threaten or intimidate the victim of the conspiracy
15 in the exercise or enjoyment of a right secured by
16 the Constitution or laws of the United States.

17 The right not to be deprived by state officials
18 acting under color of state law -- and policemen are
19 state officials for this purpose -- property or
20 liberty, without due process of law is guaranteed by
21 the Fourth Amendment to the United States Constitution.

22 Money is property within the meaning of the
23 Constitution. Abusing the power possessed as policemen
24 to confiscate the money of individuals for their own
25 use, constitutes a deprivation of property or liberty

without due process under the Constitution.

The third necessary element of Section 241 is that the victim of the conspiracy be a citizen of the United States. The 14th Amendment to the Constitution of the United States provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.

"American citizenship may be acquired by birth or naturalization or by special act."

As I explained to you, birth in Puerto Rico is equivalent to birth within one of the United States. The Government contends that persons listed in Count 1 as victims were citizens.

The fourth and final element of Section 241, that the defendant acted wilfully with the specific intent to deprive a person named in the indictment of a constitutional right.

I have already indicated to you what wilful and knowing and voluntary and intentional is. That is essentially that there is an act done deliberately with bad purpose to disobey or disregard the law.

It is not necessary to show or prove that the

1
2 defendant was thinking in constitutional terms at the
3 time of the incident, for a deliberate deprivation of
4 a person's constitutional rights -- here the right
5 not to be deprived of property by a person purporting
6 to act as a policeman. It is not necessary to show
7 that he was thinking in those constitutional terms
8 in order to have the specific intent to deprive a
9 person of his constitutional rights. You may find
10 that a defendant acted with the requisite intent,
11 even if you find that he had no real familiarity with
12 the constitution or with the particular constitutional
13 rights involved, provided that you find that he
14 wilfully and consciously did the acts which deprived
15 the victims of their constitutional rights, knowing
16 that the acts were illegal.

17 If you find that the defendant knew what he
18 was doing and that he intended to do what he was
19 doing, and if you further find that what he did
20 constituted a deprivation of a constitutional right,
21 then you may conclude that the defendant acted with
22 the specific intent to deprive the victims of their
23 constitutional rights, knowing that the acts were
24 illegal.

25 If you find that a defendant knew what he was

1
2 doing and that he intended to do what he was doing
3 and you further find that what he did constituted
4 deprivation of a constitutional right, then you may
5 conclude that the defendant acted with the specific
6 intent to deprive a victim of a constitutional right.

7 For example, the defendant need not have been
8 aware that a Federal statute or that the Federal
9 Constitution was being violated if he was aware that
10 he was wrongfully using his police authority to
11 take property in violation of the right of a person
12 to be brought to court to have those rights adjudicated
13 in a lawful way is abuse of process. If a policeman
14 deliberately uses his authority to seize money for his
15 own use, that would be a deprivation of constitutional
16 rights. A mere failure to comply with police or
17 court regulations, because of some mistake or
18 negligence would not suffice.

19 All people regardless of taint or degradation,
20 so long as they are citizens, are within the protective
21 embrace of Section 241. Even suspected criminality
22 or eventual conviction and incarceration of the
23 victims furnish no license for the destruction of
24 guaranteed constitutional rights.

25 So when we say that a defendant must have the

Charge of the Court

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1 specific intent to violate the law, what does it
2 mean in this context? Obviously, a defendant to be
3 guilty does not have to say to himself, "Today I am
4 going out and intend to and will violate the
5 constitutional rights of some person." People who
6 commit crimes such as this -- and I want to emphasize
7 that I have no views as to the guilt or innocence of
8 these two people -- do not usually have the Constitution
9 in mind when they act.
10

11 What is required in this case is that a
12 defendant have said to himself, in effect: "When
13 a suitable opportunity presents itself, I will use
14 my power and authority as a member of the New York
15 City Police Department to force citizens to give me
16 their money for my personal use, without a trial
17 before a regular court."

18 Whether the defendant was convicted or
19 acquitted or his case was dismissed or for whatever
20 reason is irrelevant in this connection.

21 Now, you remember I discussed overt acts.
22 I read them to you from the indictment. Under the
23 applicable law an individual may not be convicted of
24 a conspiracy if no overt act, physical acts are
25 committed in furtherance of the conspiracy. It is not

1
2 enough that a defendant merely agreed to do an
3 illegal act. Something physical has to be done to
4 begin the conspiracy. The physical thing that is
5 done need not itself be unlawful. Of course, the
6 conspiracy or agreement must be unlawful or there
7 is no illegal conspiracy. Unless you find beyond
8 a reasonable doubt that one of the co-conspirators
9 committed one of the overt acts charged, and that it
10 was done in furtherance of the conspiracy and with
11 knowledge that the conspiracy existed, you must
12 acquit the defendants of the conspiracy count. The
13 overt act must be committed after the conspiracy
14 commences and before it ends and in furtherance of
15 the conspiracy.

16 Since intent and purpose are states of mind
17 and it is not possible to look into a man's mind to
18 see what he was thinking, you're going to have to
19 deduce that from the evidence you have heard and
20 take into consideration all of the facts and
21 circumstances as you determine them, what the state
22 of mind of these defendants were at the times in
23 question.

24 Therefore, direct proof of wilfulness or
25 wrongful intent or knowledge is not necessary, but

1
2 it may be inferred from all the circumstances as you
3 heard them.

4 It is not necessary that the Government prove
5 both overt acts, just one of them suffices.

6 You must consider the guilt or innocence of
7 the alleged conspirators separately. That is, you
8 must determine separately, beyond a reasonable doubt,
9 as to each defendant whether he knowingly and wilfully
10 became a member of the conspiracy charged.

11 Mere similarity of conduct among various
12 persons and the fact that they may have been together
13 and discussed common interests, does not necessarily
14 establish proof of a conspiracy.

15 Mere association with conspirators is not
16 sufficient evidence of guilt of conspiracy unless
17 there are other circumstances. You have to consider
18 all of the circumstances together.

19 To summarize with respect to this first count
20 of conspiracy, you have to decide if any of these
21 defendants named, conspired to violate the civil
22 rights of the individuals enumerated in Count 1.
23 If you find such an agreement was made between these
24 persons, then go further and determine if any one of
25 these persons did any one or more of the overt acts

Charge of the Court

1
2 alleged to have been committed in furtherance of the
3 conspiracy.

4 With respect to this count, even if you were
5 to find a defendant acted wrongfully and in violation
6 of state law, our state laws against theft, robbery
7 or bribe seeking, you may not convict unless you
8 find beyond a reasonable doubt that his conduct
9 violated the Federal statute as I have explained it
10 to you.

11 Of course, an action may be in violation of
12 both Federal and state law.

13 Counts 2 and 3 are known as substantive counts.
14 They charge that the defendant illegally took money
15 from individuals, thus violating their constitutional
16 rights, although the provisions are slightly
17 different.

18 (continued next page)
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THE COURT: I will read both accounts two and

three to you together because the same law applies to both of them and they are quite similar:

Count two charges that on or about the tewntieth day of February 1971, within the Eastern District of New York, Maximo H. Jimenez and James H. Malone, under cover of the law of the State of New York, wilfully, knowingly and unlawfully did take, abstract and appropriate to themselves approximately four thousand dollars from Ishmael Quinones, an inhabitant of the State of New York -- thereby depriving him of a right secured and protected by the Constitution of the United States, namely the right not to be deprived of property without due process of law.

Count three charges the same thing except that it relates to the 18th day of March, 1971, and the taking of allegedly \$4,500 from John Boland and William Armond, depriving them of the right secured and protected by the United States Constitution, namely the right not to be deprived of property without due process of law.

Now, these two counts charge a violation of Section 242 -- the first one was of 241 of Title 18 and it reads as follows: Whoever under color of any law, statute, ordinance, regulation, or custom wilfully

2 1 subjects any inhabitant of any state, territory, or
2 district to the deprivation of any rights, privileges,
3 or immunities secured or protected by the Constitution
4 or laws of the United States shall be guilty of an
5 offense against the United States.

6 Here the two are the four elements of the crime,
7 each of which has to be proved beyond a reasonable
8 doubt: first, the conduct of the defendant must have
9 deprived the victim of a right, privilege, or immunity
10 secured or protected by the Constitution of the United
11 States. One of the rights is that no person acting
12 under color of law shall deprive any person of property
13 without due process, and money, again, is property.

14 Second, the accused must have been acting under
15 color of law, that is, while using or misusing power
16 possessed by reason of the law, that is while misusing
17 its power possessed by reason of state law.

18 A person does not have to be in uniform to vio-
19 late this duty.

20 Third, the person upon whom the alleged act was
21 committed must have been an inhabitant of the United
22 States, here, the State of New York, and fourth, there
23 must have been an intent on the part of the defendant,
24 wilfully to subject the victim of a deprivation of a
25 right, privilege or security secured or protected by

the Constitution or laws of the United States.

Section 242 requires that the person deprived of the constitutional right be an inhabitant of the State, while Section 241, which was the conspiracy section required that the person be a citizen living in an apartment or even in a hotel in New York, makes a person an inhabitant, even though he is not a citizen and even though he may be intending to leave shortly.

The conspiracy must prove beyond a reasonable doubt the defendants conspired to act under color of law.

As I have already told you, misuse of power possessed by virtue of State law may be possible only because the wrongdoer is clothed with the authority of State law, is action taken under color of law.

I have already told you about the requirement of intent with respect to conspiracy and that applies to these counts.

Even if you were to find that a defendant acted wrongfully in violation of the State law with respect **theft or robbery or bribe receiving**, you may not convict him unless you find beyond a reasonable doubt that his conduct violated Federal statutes as I have explained them to you, but again they may be violations of both State and Federal statutes.

Judge's charge

The guilt of a defendant may be established without proof that he personally did every act constituting the offense as charged, if he aided and abetted another, and this is the aiding and abetting division of the Federal statute that I am now going to explain to you.

Section 2 of Title 18 provides as follows:

Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

Whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

It is necessary in order to find aiding and abetting to find beyond a reasonable doubt that a defendant wilfully associated himself in some way with the criminal venture charged and that he wilfully participated in it as something he wished to bring about.

If you want to find out whether the defendant aided or abetted you ask yourselves such questions as did he wilfully and knowingly associate himself with a plan to take money from the person mentioned in the count; did he participate in it as something he wished

Judge's charge

to bring about; did he seek by his actions to make it succeed.

If he did, then he is an aider and abettor and if he is he is treated in the same way as the principal.

To find a defendant guilty it is necessary under count one, and this is what I am now going to tell you, relate to the so-called statute of limitations, to find that the Government prove beyond a reasonable doubt that at least one overt act in furtherance of the conspiracy was performed while the conspiracy was still in existence and while the defendant was a member of the conspiracy and within a period of five years preceding the date of indictment.

The indictment here was handed down on February 20, 1976, therefore you must find that the conspiracy continued on or after February 20, 1971 and that some overt act occurred after that date.

In order to sustain a finding of guilt under counts two and three, the Government must also prove beyond reasonable doubt that the taking of the money described in counts two and three, if you find it took place, occurred on or after February 20, 1971, because the conspiracy that was charged is charged to

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Judge's charge

2 have continued until the end of 1971, and count two
3 and count three were charged of having been committed
4 on or after February 20, 1971; but you have to find
5 that the statute of limitations doesn't bar this action.

6 So much for the law that applies to the counts
7 in the indictment here.

8 Obviously the attorneys argued to you, properly,
9 during their summations, there's a strong element of
10 credibility in this case.

11 Essentially it seems to me, though you will
12 have to decide that, the case comes down to two rela-
13 tively simple questions of fact which need to be deter-
14 mined beyond a reasonable doubt as to each defendant:
15 did he use his position as a police officer as part of
16 a conspiracy to shake down money from persons suspected
17 of drug dealing, and to decide this you will have to
18 decide who of the witnesses you believe and how much
19 credence you will give to various documents and what
20 their relationship is to the testimony you have heard.

21 Part of the Government's case against the defend-
22 ants consisted of identification testimony, testimony
23 with respect to seeing a particular defendant at a
24 particular location in time.

25 Identification testimony must be weighed care-

Judge's charge

7 1
2 fully You must consider whether the witness giving
3 the identification testimony was in a position to see
4 and hear what he claims he saw and heard, whether his
5 view was unobstructed, whether the lighting was good,
6 whether he had good eyesight and hearing and whether he
7 was a trained observer and what the other factors may
8 have been which may have interfered with his properly
9 observing or remembering.

10 You may consider the passage of time from the
11 observation in question in determining the reliability
12 of the evidence. In weighing the testimony generally
13 you may consider the relationship of the witness to
14 the Government or to the defendants, the bias or
15 interest in the outcome of the case, his or her manner
16 while testifying, his or her candor, intelligence as
17 you observed it; the sobriety at the time of the obser-
18 vation, the extent to which the witness was corroborated
19 or contradicted by other credible evidence, moral or
20 immoral acts of the witness and any arrangements made
21 with the Government.

22 If you believe a witness has wilfully sworn
23 falsely before you with respect to any material element
24 of the case, you may disregard his or her testimony
25 completely but each witness may of course have been

Judge's charge

mistaken in part and accurate in part and you will have to decide which part of the testimony you believe.

The testimony of a witness may be discredited by showing that previously he or she made statements which were inconsistent with the present testimony.

The fact that a witness has been convicted of a crime may be considered by you as evidence of lack or morality which may make it more likely that he or she will lie on the witness stand. A person who has committed perjury must have his or her testimony even more carefully scrutinized.

You are not to give any greater weight or credibility of a witness who testifies in this case solely because of the fact that he is an employee of a governmental agency. His or her testimony is to be evaluated in the same manner as you would evaluate the testimony of any other witness.

Testimony of an accomplice or informer needs to be carefully scrutinized by you. In the first place, the fact that the witness committed a felony shows a defect in his character that may have made him more likely to lie on the witness stand. In the second place, he can be punished for his own offense so that he may try to court the prosecutor's favor and avoid

Judge's charge

some degree of punishment himself or testify in return for advantages received.

The defendant Jimenez testified he never wrongfully obtained money while a police officer and that he never violated anyone's civil rights.

He has an interest in his acquittal and accordingly his testimony should be scrutinized with that fact in mind.

(continued next page)

1
2 Nothing I have said is to be taken as express-
3 ing any view of mine with respect to the credibility
4 of any witness.

5 This is an importnat matter that you must
6 decide.

7 The law does not prohibit the use of informers
8 or alleged accomplices or the pleas or other arrange-
9 ments which the witnesses described. Whether you
10 aprove of the use of any promises or advantages
11 given to witnesses should not enter into your decision
12 as to whether these defendants are guilty or innocent.
13 You should, however, consider the nature of the
14 arrangements of the witnesses on the issue of their
15 credibility.

16 The mere number of witnesses and documents has
17 no necessary relationship to the burden of proof.

18 Your recollection of the evidence governs.

19 If you wish to have some of the testimony
20 repeated you may make the request and I will call
21 you into court and have the reporter read those
22 portions you desire to hear. You can have anything
23 read back to you. I suggest, however, that you be
24 specific to avoid reading testimony you do not
25 desire to assist you in your deliberations.

charge

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1
2 If you are confused you may send a note asking
3 for help- on the law.

4 You are entitled to your own opinions but you
5 should exchange views with your fellow jurors and
6 listen carefully to each other. While you should not
7 hesitate to change your opinion if you are convinced
8 that another opinion is correct, your decision must
9 be your own.

10 Any verdict you reach must be unanimous.

11 Your oath sums up your duty ----and that is
12 without fear or favor to any man, you will well and
13 truly try these issues before these parties according
14 to the evidence given to you in court and the laws
15 of the United States.

16 If you want any of the documents, send in a
17 note and we will send them to you.

18 Now, is there any objection to my releasing
19 the alternates?

20 MR. WASHOR: No.

21 MR. GREENBERG: No.

22 MR. SCHLAM: No.

23 THE COURT: The alternates are excused.

24 Get your things and return downstairs. Do not
25 discuss this case with each other or anyone else until

1
2 after the verdict is in.

3 Thank you very much.

4 Now, will the attorneys come to sidebar in
5 case I have misspoken or omitted anything.

6 (Sidebar discussion out of hearing of the
7 jurors.)

8 MR. GREENBERG: No objections and no requests.

9 MR. WASHOR: On page 16, at the bottom of page
10 15, up to 16, the Court discusses advising the jury
11 how to determine intent. I suppose by just inadvertance
12 you left out, including the exhibits -- in other
13 words, they can consider --

14 THE COURT: Oh, yes.

15 (In hearing of the jury:)

16 THE COURT: In deciding the intent o f the
17 parties, in addition to the witnesses you have to con-
18 sider the exhibits to the extent you think they bear
19 on the question.

20 (Sidebar discussion out of hearing of the jury.)

21 MR. WASHOR: No other exceptions.

22 MR. SCHLAM: I have no exceptions.

23 (In hearing of the jury:)

24 THE COURT: Swear in the marshals. You have
25 already filled out your lunchoen requests and we will

1
2 have that about 12:30.

3 (At this time the marshals were thereupon
4 sworn.)

5 THE COURT: All right, ladies and gentlemen,
6 it is time for you to consider your verdict.

7 (The jury withdrew from the courtroom at
8 10:50 a.m.)

9 (continued next page)
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2 (11:30 a.m.)

3 THE COURT: Have you examined the note, Court's
4 Exhibit 3, gentlemen?

5 MR. SCHLAM: Y_es, your Honor.

6 MR. WASHOR: Yes, your Honor.

7 THE COURT: May I have the p-ictures of the
8 restaurant?

9 MR. WASHOR: We have agreed that these are
10 the pictures.

11 THE COURT: I am handing to the marshal
12 Defendant's Exhibit L-4, L-3, L-5, L--2, and L-1.
13 The affidavit with initials?

14 MR. WASHOR: We have that.

15 THE COURT: That is Defendant's Exhibit Y and
16 I am handing that to the marshal.

17 The Lab Report?

18 MR. W_ASHOR: There are 3 documents related to
19 the seizure.

20 THE COURT: G-overnment's Exhibit 6, 7, and 5.
21 the marshal will take those.

22 The log book?

23 MR. WASHOR: That is not in evidence.

24 THE COURT: I will tell them that.

25 The wiretap order?

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2 MR. WASHOR: There is a little problem with
3 that. The one in evidence is Exhibit X is not a
4 wiretap order for 88-10. It happens to be for the
5 buildings right around the corner.

6 MR. SCHLAM: Let me see that a second?

7 MR. WASHOR: It is on Alvares and Velano.

8 THE COURT: I will explain that to the jury.

9 MR. WASHOR: The reason the exhibit related
10 to 88-10 --

11 MR. SCHLAM: That is not what they asked for.

12 MR. WASHOR: If they are confusing the wiretap
13 order for the premises, it has to be cleared up.

14 MR. SCHLAM: I just want to point out, your
15 Honor, in the wiretap order, Defendant's Exhibit X,
16 the addresses are Middle Village Queens and Jamaica
17 Queens, which are not in the vicinity of Jackson Heights
18 Queens.

19 THE COURT: Is that the plant for this order?

20 MR. WASHOR: Yes, 88-10, the storage basement
21 area.

22 MR. SCHLAM: Your Honor, these two have nothing
23 to do with this one. This is 3419. This is Velano
24 and Alvarez.

25 MR. WASHOR: It may be part of it. We may have

1
2 to look through it, I don't remember offhand.

3 THE COURT: The wiretap and order, Defendant's
4 Exhibit X, February 17, order by Farrow. Defendant's
5 Exhibit W refers to a Shapiro order of March.

6 MR. WASHOR: Can we see it, Judge?

7 There is such an order. I guess the only way
8 to answer it, it's the follow up order apparently.
9 Can't get any other orders into evidence.

10 Your Honor, I would ask that the Court explain
11 the order that is in evidence is separate and distinct
12 from 88-10, though there is an installation sheet
13 showing a legitimate order going into evidence.

14 THE COURT: Whether it is legitimate or not,
15 it indicates that there is a court order.

16 MR. SCHLAM: I will object to that. There is
17 no basis in the record for making any statement like
18 that. They offered into evidence a wiretap.

19 THE COURT: It does show that there was a plant.

20 MR. SCHLAM: They're not asking for a plant
21 location. They are asking for a wiretap order. There
22 is no wiretap order and that is the answer to their
23 question.

24 MR. WASHOR: Except you cannot take it out of
25 context.

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2 THE COURT: I'll explain it to them. I think
3 it bears on the question.

4 You decided on what is to be read?

5 MR. WASHOR: How do you do that?

6 MR. SCHLAM: Direct and cross.

7 THE COURT: Where is it? , Let us get it.

8 Bring those exhibits in, Mr. Marshal. I will
9 ask them and they will stop whenever they want to
10 be stopped.

11 MR. SCHLAM: Your Honor, the Tange testimony
12 begins at page 57.

13 THE COURT: Give that to the reporter.

14 MR. SCHLAM: It concludes at 188.

15 MR. WASHOR: This is eliminating all the
16 colloquy.

17 MR. SCHLAM: Maurer's testimony starts at
18 459 and goes to 492.

19 (Jury present.)

20 THE COURT: You have asked for Jiminez' log
21 book, the memo pad. That was not introduced into
22 evidence. You cannot have it.

23 You have asked for a copy of a wiretap order
24 for 83-10 34th Avenue. We do not have such an order
25 in evidence. We do have, however, if you want to

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1
2 to see Defendant's Exhibit W, which shows a plant at
3 88--10 34th Avenue in the basement, pursuant to an
4 order. Do you want to see that?

5 THE FOREMAN: Yes.

6 THE COURT: Give it to the jury.

7 Now we have the testimony that you have asked
8 for. We have all of Tange's testimony and all of
9 Maurer's testimony. The Court Reporter will begin to
10 read it. It is quite a bit. As soon as you have
11 heard enough, let us know and we will stop reading.
12 Commence the reading, please.

13 (Testimony read from page 57 to page 73, line 3.)

14 THE COURT: Is that enough? Go on to the next.

15 THE FOREMAN: There's a question on the cross-
16 examination of Mr. Tange.

17 THE COURT: What do you want?

18 THE FOREMAN: -- As to whether or not he in fact
19 saw or distributed the money to the defendants himself.

20 MR. WASHOR: That is correct, your Honor.

21 THE COURT: Come to the sidebar and see if you
22 can locate that.

23 (The following transpired at the sidebar.)

24 MR. WASHOR: I can help the Court with the page,
25 I think.

100a

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2 agreed and on what they require? Court Exhibit 4?

3 MR. WASHOR: Yes. There are two areas of
4 agreement. Before you took the bench, there were
5 three areas of disagreement. Now there is no longer
6 any disagreement.

7 THE COURT: What do you want read?

8 MR. WASHOR: Page 980, line 2 thru 15.

9 Page 1006, line 15 going to 1007 line 2.

10 THE COURT: They also want a bottle of aspirin.
11 Bring in the jury.

12 THE CLERK: Juror's note marked Court's Exhibit
13 5.

14 MR. WASHOR: Would you just indicate to them
15 that there are just two portions to be read?

16 (Jury present.)

17 THE COURT: We think we found what you wanted
18 and we have instructed the reporter to read the two
19 portions. Will the reporter please read those portions?

20 (Testimony read.)

21 THE COURT: All right, we will try to find the
22 other testimony that you have asked for. It will take
23 a little while. We will send in the aspirins.

24 (Jury leaves courtroom.)

25 * * * *

1 3:30 p.m.:

2 THE CLERK: Juror's note marked Court's Exhibit 6.

3 THE COURT: What is it you have agreed should be
4 read?

5 MR. SCHLAM: Page 755, line 14 to 769, line 12.

6 MR. WASHOR: Page 797, lines 3 thru 12.

7 MR. SCHLAM: Cross-examination, pages 1027 line 7
8 to 1052 line 2.

9 (Jury present.)

10 THE COURT: The reporter will please read to you
11 the three sections. When you have heard enough, let
12 us know.

13 (Testimony read, page 755, line 14 to 769, line
14 12.)

15 THE COURT: You have heard enough? Do you want
16 to hear the cross--examination?

17 THE FOREMAN: One question I believe was
18 answered by Mr. Jiminez concerning the date that he
19 first started with the S.I.U. unit. Perhaps that could
20 be answered?

21 THE COURT: We will see if we can determine
22 it and I will send in a note.

23 MR. WASHOR: Can we do it at sidebar. We may
24 be able to do it now?

25 THE COURT: Remain, please.

(The following took place at sidebar.)

MR. WASHOR: May we have the question again?

THE COURT: The date Mr. Jiminez joined the S.I.U.

Don't we have his personnel file?

MR. WASHOR: We never put it in.

(The following took place in op-en court.)

THE COURT: We will send a note in.

THE FOREMAN: Thank you.

(Jury leaves courtroom.)

MR. SCHLAM: This is it.

MR. WASHOR: I do not think anybody went beyond that.

(Shown to Court.)

THE COURT: Is this satisfactory?

(Document shown to counsel.)

That will be marked Court's Exhibit 7.

Would you mind giving this Court Exhibit 7 to the jury?

(Document handed to marshal.)

* * *

(continued next page)

1 6 p-----m

2 THE COURT: Well, I think I will bring them
3 in and if they do not want to continue to deliberate,
4 I will send them home if there is no objection?

5 MR. GREENBERG: No objection.

6 THE COURT: Bring the jury in please.

7 (Jury present.)

8 THE COURT: I can let you continue to deliberate
9 if you think there is any chance of reaching a verdict
10 within the next few hours, and I can send out for
11 food, or I can let you go home, whichever you prefer,
12 and come in the first thing in the morning? Whichever
13 you would like to do? I do not know what the state
14 of your deliberations are. Do you want to go back and
15 think about it?

16 THE FOREMAN: The probability of reaching a
17 verdict within two hours is extremely remote.

18 THE COURT: W-ould you rather go home and come
19 in fresh in the morning? I do not want any of you
20 to get sick or anything like that. I want you to be
21 here promptly. All right, do not discuss the case
22 until you are all here in the morning. I think 9:30
23 will be suitable. Can you all make it? Be here
24 promptly at 9:30. The marshall will take all the
25 exhibits and the things you have and return them in

1
2 morning. Do not begin to deliberate until you are
3 all here. Have a pleasant evening.

4 (Jury leaves courtroom.)

5 THE COURT: Good night, I do not think there
6 is any need to be here promptly at 9:30. 10:00 I
7 think would be early enough.

8 MR. WASHOR: We are leaving all the exhibits
9 there, I suppose?

10 THE COURT: The Clerk will lock them up in a
11 closet.

12 MR. WASHOR: In case they want it before we
13 get here?

14 THE COURT: No, I won't give them any-thing
15 until you are all present.

16 * * * * *

WASHOR

AFFIDAVIT OF PERSONAL SERVICE

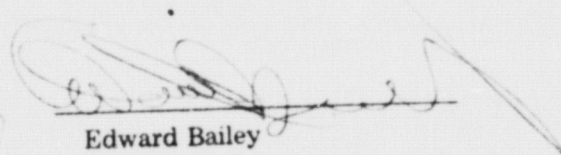
STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

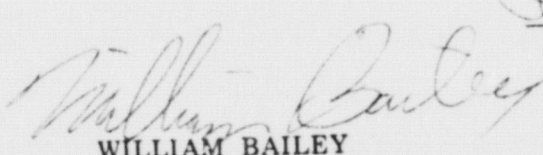
EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 29 day of Nov. , 1976 at No. 225 Cadman Plaza East., Brooklyn, NY

deponent served the within Joint Appendix
upon U.S. Atty. , East. Dist. of NY

the Appellee herein, by delivering true
copy(ies) thereof to him personally. Deponent knew the person so
served to be the person mentioned and described in said paper as the
Appellee therein.

Sworn to before me this
29 day of Nov. 1976.


Edward Bailey


WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978